SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 561.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	a
Transcript of record from the District Court of the United States for the Northern District of Illinois	a	a
Placita	1	1
Amended declaration	2	2
Plea of defendant	9	9
Demurrer to plea	13	13
Order of July 14, 1914, overruling demurrer and giving the plaintiff until Aug. 3, 1914, to elect to stand on its demurrer or to reply to defendants' plea, etc	14	14
Judgment	14	14
Petition for writ of error	15	15
Assignment of errors	16	16
Order of Aug. 27, 1914, granting writ of error	17	17
Order of Oct. 6, 1914, enlarging time within which to file record in U. S. Circuit Court of Appeals	17	17
Certificate of clerk	18	18
Writ of error	18	18
Return to writ of error	20	20
Præcipe for record	20	20
Citation	21	21

Index.

	Original.	Print.
Clerk's certificate to printed record	22	23
Order setting case for hearing	23	23
Judgment	24	23
Petition for writ of error	25	24
Order allowing writ of error	27	25
Assignment of errors	28	26
Order allowing writ of error	31	28
Præcipe for record	32	28
Notice of filing præcipe	33	29
Præcipe for record	34	29
Clerk's certificate	36	30
Writ of error	37	31
Citation and service	40	32
Opinion, per curiam	43	33
Opinion of Geiger, J., in District Court	45	34

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT,

OCTOBER TERM, A. D. 1914.

No. 2181.

THE UNITED STATES,
Plaintiff in Error,

vs.

THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY,
Defendants in Error.

MR. CHARLES F. CLYNE,
MR. SYLVESTER R. RUSH,
Counsel for Plaintiff in Error,

MR. JOSEPH H. DEFREES,
MR. GEORGE T. BUCKINGHAM,
MR. MARQUIS EATON,
Counsel for Defendants in Error.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois, begun and held at the United States Court Rooms in the City of Chicago, in said Division of said District on the first Monday of July (it being the sixth day thereof) in the year of our Lord One Thousand Nine Hundred and Fourteen and of the Independence of the United States the One Hundred and Thirty-ninth year. Placita.

Present the Honorable Kenesaw M. Landis, Judge of the District Court of the United States for the Northern District of Illinois, presiding, John J. Bradley, United States Marshal for the said District and T. C. MacMillan, Clerk of said Court.

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ion, filed
2, 1914.

2 The United States
vs.
Thomas C. MacMillan and The Empire State Surety Company, a Corporation. } 10623

Be it remembered that heretofore, to wit, on the 2nd day of January, A. D. 1914, there was filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, in the above entitled cause, an Amended Declaration; same being in the words and figures following, to wit:—

3 In the District Court of the United States of America
For the Northern District of Illinois
Eastern Division.

The United States
vs.
Thomas C. MacMillan and The Empire State Surety Company, a Corporation. } No. 10623.

The United States of America, by James H. Wilkerson, its attorney for the Northern District of Illinois, Eastern Division, by this, its amended declaration filed by leave of court for that purpose first obtained, complains of Thomas C. MacMillan and The Empire State Surety Company, a corporation created and existing under the laws of the State of New York and at all times hereinafter mentioned, admitted and authorized to transact business in the State of Illinois, defendants, of a plea that they render to the plaintiff the sum of twenty thousand dollars ($20,000) which they owe to and unjustly detain from the said plaintiff, whereupon the said plaintiff complains of the said defendants in a plea of debt, for that whereas, the said defendants, heretofore, to wit, on the 27th day of December, A. D. 1905, at Chicago, in the district and division aforesaid, by their certain writing obligatory, commonly called an "official bond," sealed with their seals, and now to the court here shown, the date whereof is the day and year aforesaid, acknowledged themselves held and firmly bound unto the United States of America in the penal sum of twenty thousand dollars ($20,000) lawful money of the United States, for the payment of which well and truly to be made the said defendants thereby bound themselves, their heirs, executors and administrators, jointly and severally, which said

writing obligatory was and is subject to a certain condition thereunder written whereby after reciting to the effect following, that whereas, pursuant to law, Thomas C. MacMillan has been appointed Clerk of the District Court of the United States for the Northern District of Illinois, it was provided in and by said condition that if the said Thomas C. MacMillan, by himself and by his deputies, shall faithfully discharge the duties of his office * * * and properly account for all moneys coming into his hands, as required by law, then the said obligation to be void, otherwise to remain in full force and virtue. And which said writing obligatory with the conditions aforesaid thereunder written was then and there received by the said United States of America as the official bond of the said Thomas C. MacMillan as Clerk of the District Court aforesaid, with the said The Empire State Surety Company, as his surety in the premises, and was then and there lodged with the Department of Justice of the said United States of America, which said writing obligatory was then and there approved according to law by said court, as the official bond of the said Thomas C. MacMillan as Clerk of the District Court of the United States for the Northern District of Illinois aforesaid, and thereupon the said Thomas C. MacMillan took upon himself to discharge the duties of his said office, and was then and there the Clerk of the District Court of the United States for the Northern District of Illinois and continued so to be and is now the said Clerk as aforesaid.

Amended declaration, filed Jan. 2, 1914.

Yet, the plaintiff in fact says, that the said Thomas C. MacMillan did not faithfully discharge the duties of his office and properly account for all moneys coming into his hands as Clerk of the said District Court, according to law and according to the conditions of said writing obligatory, but that during the period for which he was so appointed Clerk of the District Court of the United States for the Northern District of Illinois, and during the period between the said 27th day of December, A. D. 1905, and the 27th day of January, A. D. 1910, during all of which said period the said writing obligatory as aforesaid was and continued to remain in full force and virtue, the said Thomas C. MacMillan, Clerk as aforesaid, wholly negected and failed to truly and faithfully perform all the duties of his said office according to law and to the tenor of said writing obligatory, and said plaintiff here assigns the breaches of the conditions of said bond as follows:

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n. 2, 1914.

First Assignment: Heretofore, to wit, during all of the period aforesaid, between the 27th day of December, A. D. 1905, and the 27th day of January, A. D. 1910, said Thomas C. MacMillan was in office as aforesaid, filling and occupying the position of Clerk of the United States District Court as aforesaid, by reason whereof a large sum of money, to wit, three thousand eight hundred sixty-one dollars and five cents ($3,861.05) came into the hands of the said Thomas C. MacMillan in his official capacity as said Clerk, and not otherwise, that is to say, that the said moneys, amounting in the aggregate to the sum of three thousand eight hundred sixty-one dollars and five cents ($3,861.05) were derived from payments made to the said Thomas C. MacMillan for and on account of the interest on public moneys and moneys entrusted to the said Thomas C. MacMillan in his official capacity, as said Clerk, to wit, (a) moneys paid to the Clerk as fees under the bankruptcy laws of the United States, and (b) moneys paid to the Clerk as his fees and compensation and as his emoluments as Clerk under various statutes of the United States, and (c) moneys deposited with the Clerk by various litigants in said District Court under and by virtue of certain rules of said court, held by said Thomas C. MacMillan and deposited by him as Clerk aforesaid, and the said aggregate was a sum of money collected by the said Thomas C. MacMillan which was paid to him for the use of said moneys collected and held by him as Clerk as aforesaid under the laws of the United States and under authority of the rules and regulations of the Department of Justice, and the same is and was no part of any sum or sums earned by him, the said Thomas
6 C. MacMillan, as such Clerk, but was in fact and is money held by him, the said Thomas C. MacMillan as such Clerk for the use and benefit of the said United States and of said litigants in said District Court, and divers other persons who were and are entitled to receive said moneys from said Thomas C. MacMillan, Clerk as aforesaid.

Plaintiff further avers that thereafter, to wit, on July 15th, 1910, said plaintiff made demand upon the said Thomas C. MacMillan that he, said Thomas C. MacMillan, account for said sum so collected by him as aforesaid and deposit the same with the Treasurer or an Assistant Treasurer of the United States or a designated depository of the United States, in the name and to the credit of said District Court to be held for the use and benefit of the parties entitled thereto, and that said Thomas C. MacMillan, and the said surety on said

bond aforesaid, have wholly failed and refused, either to pay said money to said United States or to deposit the same with the Treasurer or an Assistant Treasurer of said United States, or in a designated depository of the United States in the name and to the credit of said District Court or to pay the same into any other fund provided by law, for the use and benefit of the parties entitled thereto, and that said Thomas C. MacMillan, in violation of the obligations of said writing obligatory aforesaid, has wrongfully converted said sums of money amounting in the aggregate to the sum of three thousand eight hundred sixty-one dollars and five cents ($3,861.05) to his own use, and that by reason of said wrongful conduct on the part of said Thomas C. MacMillan and by reason of the non-performance by him of his duties in that behalf an action has accrued to the said United States of America to have and recover from the said defendants herein the said sum of twenty thousand dollars ($20,000). Yet the said defendants have not, or either of them, paid said sum, or any part thereof, to the damage of said plaintiff of twenty thousand dollars ($20,000).

Amended declaration, filed Jan. 2, 1914.

7 Second Assignment: Heretofore, to wit, during all of the period aforesaid, between the 27th day of December, A. D. 1905, and the 27th day of January, A. D. 1910, said Thomas C. MacMillan was in office as aforesaid, filling and occupying the position of Clerk of the United States District Court as aforesaid, by reason whereof a large sum of money, to wit, three thousand eight hundred sixty-one dollars and five cents ($3,861.05) came into the hands of the said Thomas C. MacMillan in his official capacity as said Clerk, and not otherwise, that is to say, that the said moneys amounting in the aggregate to three thousand eight hundred sixty-one dollars and five cents ($3,861.05) were derived from payments made to the said Thomas C. MacMillan for and on account of the interest on moneys entrusted to the said Thomas C. MacMillan in his official capacity, to wit, moneys deposited with the said Clerk by various litigants in said District Court under and by virtue of certain rules of said court and held by said Thomas C. MacMillan and deposited by him as Clerk as aforesaid, and said amount was a sum of money collected by the said Thomas C. MacMillan which was paid to him for the use of said moneys collected and held by him as Clerk as aforesaid, under the laws of the United States and under authority of the rules and regulations of the Department of Justice, and the same is and was no part of any sum or sums earned by him, the

Amended declaration, filed Jan. 2, 1914.

said Thomas C. MacMillan as such Clerk but was and is money held by him, the said Thomas C. MacMillan, as such Clerk, for the use and benefit of said litigants in said District Court, who were and are entitled to receive said money from the said Thomas C. MacMillan, Clerk as aforesaid.

Plaintiff further avers that thereafter, to wit, on July 15th, 1910, said plaintiff made demand upon the said Thomas C. MacMillan that he, said Thomas C. MacMillan, account for said sums so collected by him as aforesaid, and deposit the same with the Treasurer or an Assistant Treasurer of the United States, or a designated depository of the United States in the name and to the credit of said District Court to
8 be held for the use and benefit of the parties entitled thereto, and that said Thomas C. MacMillan and the said surety on said bond, aforesaid, have wholly failed and refused either to pay said money to said United States, or to deposit the same with the Treasurer or an Assistant Treasurer of said United States, or in a designated depository of the United States, in the name and to the credit of the said District Court, or to pay the same into any other fund provided by law for the use and benefit of the parties entitled thereto, and the said Thomas C. MacMillan, in violation of the obligations of said writing obligatory aforesaid, has wrongfully converted said sums of money amounting in the aggregate to the sum of three thousand eight hundred sixty-one dollars and five cents ($3,861.05) to his own use, and that by reason of said wrongful conduct on the part of said Thomas C. MacMillan and by reason of the non-performance by him of his duties in that behalf, an action has accrued to the said United States of America to have and recover from the said defendants herein the said sum of twenty thousand dollars ($20,000). Yet the said defendants have not, or either of them, paid said sum, or any part thereof, to the damage of said plaintiff of twenty thousand dollars ($20,000).

Third Assignment: Heretofore, to wit, during all of the period aforesaid, between the 27th day of December, A. D. 1905, and the 27th day of January, A. D. 1910, said Thomas C. MacMillan was in office as aforesaid, filling and occupying the position of Clerk of the United States District Court as aforesaid, and by reason of his official position aforesaid, there came into the possession of said Thomas C. MacMillan, as Clerk of said District Court, divers large sums of money, amounting in the aggregate to the sum of, to wit, two hundred and fifty thousand dollars ($250,000), which were deposited with him as said Clerk by various litigants in said District

Court under and by virtue of certain rules of said court, and which were held by said Thomas C. MacMillan, as Clerk of said court.

Amended declaration, filed Jan. 2, 1914.

Plaintiff further avers that said sums of money which so came into the possession of said Thomas C. MacMillan as aforesaid, were not and never did become the property of
9 said Thomas C. MacMillan, but were moneys belonging to divers litigants in said court who had deposited the same with said Clerk to secure the payment of court costs, clerk's fees, witness fees and other expenses and to satisfy orders and judgments in litigation pending in said court, and continued to be the property of said litigants in the possession of said Clerk as aforesaid, until they were used for the payment of said court costs, clerk's fees, witness fees and other expenses, and to satisfy orders and judgments in litigation, or were returned by said Clerk to said litigants.

Plaintiff further avers that said Thomas C. MacMillan, Clerk as aforesaid, deposited said sums of money belonging to said litigants and in his possession as Clerk of said Court as aforesaid with divers banks, and collected upon said moneys so deposited the interest thereon amounting to the sum of, to wit, three thousand eight hundred sixty-one dollars and five cents ($3,861.05) and that said interest so collected was at no time, and is not, the property of said Thomas C. MacMillan, and was and is the property of said litigants in said court upon whose money said Thomas C. MacMillan, Clerk as aforesaid, collected said interest.

Plaintiff further avers that thereafter, to wit, on July 15th, 1910, said plaintiff made demand upon the said Thomas C. MacMillan that he, said Thomas C. MacMillan, account for said sums so collected by him as aforesaid, and deposit the same with the Treasurer or an Assistant Treasurer of the United States, or a designated depository of the United States, in the name and to the credit of said District Court to be held for the use and benefit of said parties entitled thereto, and that said Thomas C. MacMillan, and said surety on said bond aforesaid, have wholly failed and refused either to pay said money to said United States, or to deposit the same with the Treasurer or an Assistant Treasurer of said United States, or in a designated depository of the United States, in the name and to the credit of said District Court, or to pay the same into any other fund provided for by law, for the use and benefit of the parties entitled thereto, and that said Thomas C. MacMillan, in violation of the obligations of said

Amended declaration, filed Jan. 2, 1914.

writing obligatory aforesaid, has wrongfully converted
10 said sums of money, amounting in the aggregate to the sum of three thousand eight hundred sixty-one dollars and five cents ($3,861.05) to his own use, and that by reason of said wrongful conduct on the part of said Thomas C. MacMillan, and by reason of the non-performance by him of his duties in that behalf, an action has accrued to the said United States of America to have and recover from the said defendants herein the said sum of twenty thousand dollars ($20,000). Yet the said defendants have not, or either of them, paid said sum, or any part thereof, to the damage of said plaintiff of twenty thousand dollars ($20,000).

And, therefore, it brings suit, etc.

JAMES H. WILKERSON,
United States Attorney,
Attorney for plaintiff.

11 Endorsed: No. 10623. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States vs. Thomas C. MacMillan and The Empire State Surety Company, a corporation. Amended Declaration of Debt. Filed Jan. 2, 1914, at .... o'clock .... M. T. C. MacMillan, Clerk. James H. Wilkerson, U. S. Attorney.

12 And afterwards, to wit, on the 1st day of July, A. D. 1911, there was filed in the Clerk's office of said Court, in the above entitled cause, a Plea of Defendants, same being in the words and figures following, to wit:—

13 UNITED STATES OF AMERICA,

Plea of Defendants, filed July 1,

Northern District of Illinois,

Eastern Division.

United States of America,
—*vs*—
Thomas C. MacMillan *et al.*

PLEA OF DEFENDANTS.

And the defendants, Thomas C. MacMillan, and The Empire State Surety Company, come and say that the plaintiff ought not to have and maintain its aforesaid action against them, the defendants, because they say:—

That there came into the possession and custody of said Thomas C. MacMillan, (hereinafter referred to as "Clerk"), and was deposited by him in various banks, while he was in such custody and possession, certain moneys (in all, hereinafter referred to as the "Aggregate Principal").

That said "aggregate principal" was composed of, and came from sources, respectively, following, and not otherwise, to-wit:—

(a) Moneys paid to the Clerk as Clerk's fee and compensation, under the bankruptcy laws of the United States; and

(b) Moneys paid to the Clerk as his fees, and compensation, and as his emoluments as Clerk, under various other
14 statutes of the United States; and

(c) Moneys deposited with the Clerk by various litigants in said District Court, under and by virtue of certain rules of said court, hereinafter referred to.

That on the average balances of said "aggregate principal" so remaining from day to day on deposit, the Clerk received interest, at the rate of two (2) per cent. said interest so received being the said three thousand eight hundred sixty-one and 05/100 dollars ($3,861.05) mentioned in the declaration, and no other.

That as to the money included in items (a) and (b), and in that portion of item (c) which was, after its deposit, paid to the Clerk as Clerk's fees, emoluments or compensation as hereinafter mentioned (and which portion is hereinafter for convenience referred to as fund "d"), the Clerk did on the

of defendants, filed July, 1, 1911.

first day of each January and July, of each year, or within thirty (30) days thereafter, during all the time mentioned in the declaration, and in all respects as provided by statute, make a written return to the Attorney General of the United States, on a form prescribed by the latter, for and covering the next preceding semi-annual period, of all the fees and emoluments of his said office as Clerk of said District Court, and included in the same, all of the moneys composing said items (a) and (b), and that portion of item (c) paid to the Clerk as fund "d."

That each of said returns included also a statement of the necessary expenses of said office during the same respective semi-annual period, including necessary clerk hire, (and including his own compensation as allowed by law) and was accompanied by vouchers, for, and showing the payment of the same; that each said return particularly stated the amounts for the respective preceding half year, of all fees and emoluments received, and of all said necessary expenses paid out, which expenses were deducted on said statement from the entire amount of all said fees and emoluments received; that the surplus of money then remaining, and thus shown, was in each said half year period, and immediately after said return was made, to-wit: on the same day, paid into the Treasury of the United States, or to the Sub-treasurer of the United States, as was then directed by the Attorney General, and said surplus thus shown, and accounted for and paid, was in each case received by the United States.

That the said interest received by the Clerk in each said semi-annual period earned and accrued as aforesaid, upon said items (a) and (b), and upon that portion of item (c) above mentioned as fund "d" was so earned and accrued before, and not after, the said fees and emoluments composing the said items, had been so included in, and made the subject of, said return, and had formed the basis of the computation and ascertainment of said surplus.

That there was, during all of the time mentioned in the declaration, in full force and effect, certain rules of the said District Court, in words and figures following, to-wit:—

—3—

DEPOSITS.

(1) Upon the commencement of any original suit, and be-

fore the process is issued, the plaintiff shall deposit with
16 the Clerk twenty-five dollars to be applied to the payment
of costs as they shall accrue; and before any transcript in any cause transferred or certified into this court is filed, except by the United States, or some Government officer, the party so removing shall deposit a like sum to be applied in the same manner. Whenever the costs accruing against either party shall equal or exceed the sum so deposited, an additional sum shall, upon demand by the Clerk, be deposited by such party.

Plea of defendants, July, 1,

(3) Upon filing a demurrer, plea, or other appearance in a law case, each defendant appearing separately in person or by counsel, and each group of defendants entering one joint appearance in person or by counsel, shall deposit with the Clerk five dollars to apply on the payment of court costs made by such defendants as they shall accrue. If there are other defendants appearing by separate attorney, a like sum will be deposited by their counsel. Whenever such costs equal or exceed the sum so deposited, an additional sum shall, upon demand by the Clerk, be deposited by such party.

—32—

MONEYS.

The Clerk of this court shall receive any moneys paid to him to be applied on any judgments in this court, and pay out the same to the parties or attorneys of record entitled to receive it upon taking a receipt therefor without further order of the court, and the clerk shall be entitled to one per cent on
all moneys so received and paid out to be accounted for
17 by the Clerk as earnings of his office. In case where
money is paid to the Clerk under special order of court, any party interested may move for an order that the Clerk deposit the same under the direction of the court. On deposits so made the Clerk shall, upon motion of either party and upon order of the court, be required to account for any interest collectible on said fund; but without such order he shall not be required to account for interest.

When any balance of the original deposit made to secure costs remains unexpended, and the time for suing out a writ of error or appeal has expired, such balance shall be paid to the original depositor, or his successor, as soon as practicable.

That said item (c) was composed entirely of money paid

of de-
dants, filed
y. 1, 1911.

to the Clerk by litigants in said court, under and by virtue of said court rules above mentioned, and for the purpose of being disbursed by the Clerk—

To himself as fees or compensation allowed by law; and to the Marshal and other court officers as their respective fees or compensation allowed by law, and to other persons, and for other purposes, connected with litigation, as the same should be from time to time, by the said court directed.

That all of the fees and emoluments earned by the Clerk, and to which he became entitled, to be paid and which he
18 was paid out of said item (c), were by him included in, and specified in his said respective semi-annual returns and reports, as aforesaid.

That the portion of the money composing said item (c), which was composed of said fees and compensation of the Marshal, and other court officers, and said sums directed by the court to be paid to others, was all, by the Clerk, paid to those court officers entitled to the same, as, and when the same was by such officers earned, or was paid to such other persons when and as the court directed the same to be paid to them, as the case might be; said portion being herein called and referred to as fund "e."

That the money composing the residue of said item (c), other than fund "d" and fund "e," was by the Clerk paid out to the persons depositing the same or to their successors entitled thereto, under and by virtue of said court rule, as and when the same was and became payable.

That of the said sum of money composing item (c), that portion earned by, and paid to, the Clerk as fees and emoluments earned by him as Clerk (being fund "d"), was in each case included in, and settled for, in the respective semi-annual returns as aforesaid.

And this the defendants are ready to verify.

Wherefore defendants pray judgment, etc.

DEFREES, BUCKINGHAM, RITTER, CAMPBELL & EATON,
Attorney for Defendants.

19 Endorsed: 10623. District Court of U. S. United States of America vs. Thomas C. MacMillan, and The Empire State Surety Company. Plea of Defendants. Filed July 1, 1911. T. C. MacMillan, Clerk.

20 And afterwards, to wit, on the 14th day of July, A. D. 1911, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Demurrer to Plea; same being in the words and figures following, to wit:— Demurrer to plea, filed July 14.

21 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

United States of America
v.
Thomas C. MacMillan, and The Empire State Surety Co. } No. 10623.

DEMURRER TO PLEA.

And the said plaintiff says that the said plea by the said defendants in manner and form as pleaded and the matters therein contained and set forth are not sufficient in law to bar the said plaintiff of its aforesaid action against them and that the said plaintiff is not bound by law to answer the same and this the plaintiff is ready to verify.

Wherefore, judgment is prayed, etc. as aforesaid, etc.

EDWIN W. SIMS,
United States Attorney,
Attorney for Plaintiff.

22 Endorsed: No. 10623. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America vs. Thomas C. MacMillan, and Empire State Surety Company. Demurrer to Plea. Filed July 14, 1911. T. C. MacMillan, Clerk. Edwin W. Sims, U. S. Attorney.

23 And afterwards, to wit, on the 14th day of July, A. D. 1914; the following order was had and entered of record in said cause, to wit:—

r of July 1914.

24 United States of America
v.
Thomas C. MacMillan, and The Empire State Surety Company. } No. 10623.

Come the parties by their attorneys and on motion It is Ordered by the Court that the plea of the defendants to the declaration stand as the plea to the amended declaration and that the plaintiff's demurrer to the plea of the defendants to the declaration stand as the demurrer to the plea to the amended declaration and the Court having heard the arguments of counsel on said demurrer and being fully advised in the premises overrules the same and gives the plaintiff until August 3, 1914, to elect to stand on its demurrer or to reply to the defendants' plea.

25 And afterwards, to wit, on the 31st day of July, A. D. 1914, the following order was had and entered of record in said cause, to wit:—

United States of America
vs.
Thomas C. MacMillan, and The Empire State Surety Company, a corporation. } #10623

Come the parties by their attorneys and the Plaintiff by United States Attorney elects to stand by its demurrer. Whereupon, it is Ordered by the Court that the Plaintiff take nothing by its amended declaration and that the Defendants go hence without day; to which judgment of the Court, the Plaintiff by its attorney duly excepts, and is granted sixty days' time within which to file its Bill of Exceptions.

26 And afterwards, to wit, on the 27th day of August, A. D. 1914, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Petition for Writ of Error; same being in the words and figures following, to wit:—

27 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois,

Eastern Division.

Petition for writ of error filed Aug. 1914.

United States of America
v.
Thomas C. MacMillan, and The Empire State Surety Company, a Corporation. } No. 10623.

PETITION.

To the Honorable Ferdinand A. Geiger:

Your petitioner, United States of America, by James H. Wilkerson, Attorney for the Northern District of Illinois, respectfully represents and shows that on the fourteenth day of July, A. D. 1914, at the regular July term of said District Court of the United States of America for the Northern District of Illinois, Eastern Division thereof, a final order was entered in said court overruling the demurrer of the plaintiff, United States of America, to a plea filed by the defendants herein, and on the thirty-first day of July, A. D. 1914, said court entered a judgment for the defendants in accordance with the order sustaining the demurrer.

Your petitioner further states that he is advised and believes that the court erred in overruling said demurrer and in entering judgment for the defendants herein;

Wherefore, your petitioner prays that it be allowed a writ of error and that the record in said case be ordered to be certified to the Circuit Court of Appeals of the United States for the Seventh Judicial Circuit, as by law provided, to the end that the errors complained of, if any such have occurred, may be duly corrected and full and separate justice done in the premises.

J. H. WILKERSON,
United States Attorney.

28 Endorsed: No. 10623. In the District Court of the United States for the Northern District of Illinois, Eastern Division, United States of America vs. Thomas C. MacMillan, and The Empire State Surety Company, a Corporation. Petition. Filed Aug. 27, 1914, at 2 o'clock P. M. T. C. MacMillan, Clerk.

nment of rs, filed t. 27, 1914.

29 And afterwards, to wit, on the 27th day of August, A. D. 1914, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Assignment of Errors; same being in the words and figures following, to wit:—

30 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois,

Eastern Division.

United States of America
v.
Thomas C. MacMillan, and The Empire State Surety Company, a Corporation } No. 10623.

ASSIGNMENT OF ERRORS.

Now comes the United States of America, by its attorney, James H. Wilkerson, Attorney for the Northern District of Illinois, and says there is manifest error on the face of the record in the above entitled cause, in this:

1. The District Court of the United States for the Northern District of Illinois, Eastern Division, erred in overruling the demurrer to the plea to the amended declaration herein.
2. The court erred in not sustaining the demurrer to the plea to the amended declaration herein.
3. The court erred in holding that the plea herein stated a good defense to the amended declaration herein.
4. The court erred in entering judgment for the defendants.

J. H. WILKERSON,
United States Attorney.

31 Endorsed: No. 10623. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America, vs. Thomas C. MacMillan, and The Empire State Surety Company, a Corporation. Assignment of Errors. Filed Aug. 27, 1914, at 2 o'clock P. M. T. C. MacMillan, Clerk.

32 And afterwards, to wit, on the 27th day of August A. D. 1914, the following order was had and entered of record in said cause, to wit:—

The United States
vs.
T. C. MacMillan, *et al.* } No. 10623

Order of A
27, 1914.

Comes the United States by James H. Wilkerson, Esq., United States Attorney and on his motion supported by petition for a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit accompanied by an assignment of errors, It is Ordered that a writ of error be granted as prayed in said petition.

33 And afterwards, to wit, on the 6th day of October, A. D. 1914, there was filed in the Clerk's Office of said Court in the above entitled cause, an order, enlarging time within which to file record; same being in the words and figures following, to wit:

Tuesday, October 6, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

United States of America,
Plaintiff in Error,
vs.
Thomas C. MacMillan and The Empire State Surety Co.
Defendants in Error. } District Court No. 10623.

On motion of Charles F. Clyne, United States Attorney, it is hereby ordered that the time within which plaintiff in error may file the record in this Court shall be enlarged up to and including October 20, 1914.

Endorsed: United States Circuit Court of Appeals, For the Seventh Circuit. Filed Oct. 6, 1914, at ..... o'clock ..... M. T. C. MacMillan, Clerk.

Certificate of Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
Eastern Division.

34 I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record in the above entitled cause, prepared in accordance with praecipe attached hereto, as same appears from the records and files in said cause now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Chicago, in said District, this 13th day of October, A. D. 1914.

T. C. MACMILLAN
Clerk.

(Seal)

Citation.

35 United States of America, } ss.

The President of the United States, To Thomas C. MacMillan and The Empire State Surety Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein The United States is plaintiff in error and you are defendants in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ferdinand A. Geiger, Judge of the District Court of the United States, this 27th day of August, in the year of our Lord one thousand nine hundred and fourteen.

F. A. GEIGER,
Dist. Judge.

(Endorsed) No. 10,623 District Court of the United States, Northern District of Illinois, Eastern Division. Citation. Returnable Sept. 27, 1914. T. C. MacMillan, Clerk.

36 United States of America, } ss.

Writ of error.

The President of the United States, To the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States plaintiff and Thomas C. MacMillan and The Empire State Surety Company defendants a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of August, in the year of our Lord one thousand nine hundred and fourteen.

(Seal) T. C. MacMillan
Clerk of the District Court of the United States for the Northern Dist. of Illinois.

Allowed by

.....
Judge.

(Seal)

Return to writ of error.

Northern District of Illinois, } ss.

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 13th day of October, A. D. 1914.

T. C. MacMillan
Clerk United States District Court,
Northern District of Illinois.

(Endorsed) 10,623 United States Circuit Court of Appeals Seventh Circuit The United States Plaintiff in Error, vs. T. C. MacMillan et al. Defendant in Error. Writ of Error Copy depos ted for the defendant in error in the Clerk's Office, U. S. Circuit Court, Northern District of Illinois.

37 UNITED STATES OF AMERICA

Praecipe for record, filed Sept. 14, 1914.

Northern District of Illinois

Eastern Division.

In the District Court Thereof } ss.
September Term, A. D. 1914 }

United States of America
v.
Thomas C. MacMillan and The Empire State Surety Company, a Corporation } No 10623.

PRAECIPE FOR RECORD ON WRIT OF ERROR.

To T. C. MacMillan, Esq., Clerk of the District Court of the United States, For the Northern District of Illinois.

Please prepare the record in the above entitled cause for the purpose of filing the same as a writ of error in the Circuit Court of Appeals of the United States for the Seventh Judicial Circuit, which shall include the following:

Amended declaration filed January 2, 1914; plea of defendants; demurrer to plea; order of July 14, 1914; and order of July 31, 1914; Petition for Writ of Error, filed Aug. 27, 1914; and Assignments of Error, filed Aug. 27, 1914; Order of Aug. 27, 1914.

CHARLES F. CLYNE
Attorney for Plaintiff.

Dated Chicago, September 12th, 1914.

Received a copy of the foregoing praecipe this 12th day of September, A. D. 1914.

DEFREES, BUCKINGHAM & EATON
Attorneys for Defendants.

(Endorsed) No. 10623 In the District Court of the United States for the Northern District of Illinois Eastern Division. United States of America vs. Thomas C. MacMillan and The Empire State Surety Company, a corporation. Praecipe for Record on Writ of Error. Filed Sep 14 1914 at 2 o'clock P. M. By T. C. MacMillan, Clerk Charles F. Clyne, United States Attorney.

22 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 21, inclusive, contain a true copy of the printed record, filed February 8, 1918, on which this cause was argued, heard and determined in the case of the United States vs. Thomas C. MacMillan and The Empire State Surety Company, No. 2181, October term, 1914, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this eighth day of July, A. D. 1918.

[SEAL.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

23 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room in the city of Chicago in said Seventh Circuit on the second day of October, 1917, of the October term, in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-second year.

And afterwards, to wit, on the ninth day of April, 1918, in the October term aforesaid, the following proceedings were had and entered of record, to wit:

TUESDAY, April 9, 1918.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Christian C. Kohlsaat, circuit judge, presiding; Hon. Samuel Alschuler, circuit judge; Hon. Evan A. Evans, circuit judge; Hon. Ferdinand A. Geiger, district judge; Edward M. Holloway, clerk; John J. Bradley, marshal.

Before: Hon. Christian C. Kohlsaat, circuit judge; Hon. Evan A. Evans, circuit judge; Hon. Ferdinand A. Geiger, district judge.

THE UNITED STATES *vs.* THOMAS C. MACMILLAN ET AL.	2181. Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing on April 16, 1918.

24 And afterwards, to wit, on the sixteenth day of April, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record to wit:

TUESDAY, April 16, 1918.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Francis E. Baker, circuit judge, presiding; Hon. Christian C. Kohlsaat, circuit judge; Hon. Samuel Alschuler, circuit judge; Hon. Evan A. Evans, circuit judge; Edward M. Holloway, clerk; John J. Bradley, marshal.

Before: Hon. Francis E. Baker, circuit judge; Hon. Christian C. Kohlsaat, circuit judge; Hon. Evan A. Evans, circuit judge.

THE UNITED STATES *vs.* THOMAS C. MACMILLAN AND THE EMPIRE SURETY COMPANY.	2181. Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Joseph B. Fleming, counsel for plaintiff in error, and by Mr. George T. Buckingham, counsel for defendants in error.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division,
25 in this cause be, and the same is hereby, affirmed on the authority of the opinion rendered by this court in cause No. 2180, The United States vs. Thomas C. MacMillan et al.

And afterwards, to wit, on the sixth day of July, 1918, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain petition for writ or error, which said petition for writ of error is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

October term, A. D. 1917.

No. 2181.

The United States, plaintiff in error, vs. Thomas C. MacMillan and The Empire State Surety Company, defendants in error.

Petition for writ of error from the United States Supreme Court to the Circuit Court of Appeals for the Seventh Circuit.

To the honorable circuit judges, Seventh Circuit:

Your petitioner, the United States of America, by Charles F. Clyne, United States attorney, and Sylvester R. Rush, special assistant to the Attorney General, being duly authorized by the Attorney General of the United States, respectfully represent and show that on the 16th day of April, A. D. 1918, at the regular October term of the said Circuit Court of Appeals of the United States of

America for the Seventh Circuit, a final order and judgment
26 was entered in said court affirming the judgment of the United States District Court for the Northern District of Illinois, overruling the demurrer of the plaintiff in error, the United States of America, to a plea filed to plaintiff's petition by the defendants in error herein, and on the 31st day of July, A. D. 1914, said District Court entered a judgment for the defendants in accordance with the order overruling said demurrer.

Your petitioner further states that it is advised and believes that the said Court of Appeals erred in affirming the said District Court in overruling said demurrer and in entering judgment for the defendants in error herein, and that the matter in controversy in said suit exceeds one thousand ($1,000.00) dollars, besides costs, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error;

Wherefore, your petitioner and plaintiff in error respectfully prays that a writ of error be allowed the petitioner in the above-entitled cause directing the clerk of the United States Circuit Court of Appeals for the Seventh Circuit to send the record of the proceedings in said cause, with all things concerning the same, duly authenticated to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed and if error be found, corrected according to the laws and practice of the United States.

CHARLES F. CLYNE,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

27 UNITED STATES OF AMERICA,
Eastern Division of the Northern District of Illinois, ss:

Upon reading and filing the foregoing petition and the assignment of errors herein referred to it is ordered that the petition be and the same hereby is allowed; that a writ of error as therein prayed be issued by the clerk of the United States Circuit Court of Appeals for the Seventh Circuit, under the seal of said court. It is further ordered that the foregoing allowance of said writ of error shall operate as a supersedas in said cause, until the final disposition of the same by the Supreme Court of the United States.

Dated at Chicago, Illinois, this 6th day of July, A. D. 1918.

FRANCIS E. BAKER,
Judge, Circuit Court of Appeals,
Seventh Circuit.

(Endorsed:) Filed July 6, 1918. Edward M. Holloway, clerk.

And afterwards, on the same day, to wit, on the sixth day of July, 1918, in the October term last aforesaid, there was filed in the office

of the clerk of this court a certain assignment of errors, which said assignment of errors is in the words and figures following, to wit:

In the United States Circuit Court of Appeals, for the Seventh Circuit.

October Term, A. D. 1917.

No. 2181.

The United States, plaintiff in error, vs. Thomas C. MacMillan and The Empire State Surety Company, defendants in error.

28 *Assignment of errors on writ of error from the Supreme Court of the United States to the Circuit Court of Appeals for the Seventth Circuit.*

Now comes the United States of America, and by its attorneys, Charles F. Clyne, United States attorney for the Northern District of Illinois, and Sylvester R. Rush, special assistant to the Attorney General, and in connection with its said petition for a writ of error says that in the record and proceedings aforesaid of the said United States Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of the said plaintiff in error, and this plaintiff in error here assigns the following errors, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, in favor of the said defendant in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and in not remanding said cause to the said court directing judgment to be entered for plaintiff in error, or for trial.

Third. Said Circuit Court of Appeals erred in not sustaining plaintiff's first, second, third, and fourth assignments of error.

Fourth. Said Circuit Court of Appeals erred in sustaining the District Court of the United States for the Northern District
29 of Illinois, Eastern Division, in overruling the demurrer to the plea of the amended declaration herein.

Fifth. Said Circuit Court of Appeals erred in affirming the order and judgment of the said District Court in refusing to sustain the demurrer to the plea to the amended declaration herein.

Sixth. Said Circuit Court of Appeals erred in affirming the judgment of the said District Court in holding that the plea herein stated a good defense to the amended declaration herein.

Seventh. Said Circuit Court of Appeals erred in failing to take judicial notice that the said Thomas C. MacMillan, defendant in error, clerk of the Northern District of Illinois, Eastern Division, under act of Congress of July 31, 1894 (28 Statutes at Large, 204), was a salaried officer whose compensation was by law fixed at $3000.00 per annum, and the said clerk was therefore prohibited by section 1765 of the Revised Statutes of the United States from receiving and retaining any part of the said three thousand eight hundred sixty-one dollars and five cents ($3,861.05), herein sued for, as additional compensation.

Eighth. Said Circuit Court of Appeals erred in refusing to hold that the moneys included in the said clerk's semi-annual return on which said interest was collected and retained by the said clerk prior to being so included, did not belong to the said clerk and that he must account for the interest received thereon to the United States.

Ninth. Said Circuit Court of Appeals erred in not holding that all moneys entrusted to the said clerk by litigants and bankrupts, not included in his semi-annual emolument returns, are trust funds for which the said clerk as bailee or trustee under his said bond must account to the United States, including said moneys received thereon as interest and appropriated to his own use.

Tenth. Said Circuit Court of Appeals erred in entering judgment herein for defendants in error.

Wherefore, the said plaintiff in error prays that for the errors aforesaid and other errors appearing in the record of the said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the said plaintiff in error, said judgment of the said United States Circuit Court of Appeals be reversed, annulled and vacated and that said cause be remanded to the United States Circuit Court of Appeals, Seventh Circuit, Northern District of Illinois, with instruction to enter judgment for plaintiff in error or for such further proceedings in said cause as may be determined upon by this honorable court to the end that justice may be done in the premises.

CHARLES F. CLYNE,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

(Endorsed:) Filed July 6, 1918. Edward M. Holloway, clerk.

And afterwards, on the same day, to wit, on the sixth day of July, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

SATURDAY, *July 6, 1918.*

Court met pursuant to adjournment.

31 Present: Hon. Francis E. Baker, circuit judge, presiding; Hon. Samuel Alschuler, circuit judge; Edward M. Holloway, clerk.

Before: Hon. Francis E. Baker, circuit judge.

THE UNITED STATES *vs.* THOMAS C. MACMILLAN ET AL.	2181. Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes the United States, plaintiff in error, by its counsel, Mr. Charles F. Clyne, United States attorney for the Northern District of Illinois, and Mr. Sylvester R. Rush, Special Assistant to the Attorney General, and presents an assignment of errors and a petition for a writ of error to remove this cause to the Supreme Court of the United States, and on consideration whereof, it is now here ordered that said petition for a writ of error be, and the same is hereby allowed; and it is ordered that a writ of error issue as prayed for in the said petition.

And afterwards, on the same day, to wit, on the sixth day of July, 1918, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain præcipe for record, which said præcipe is in the words and figures following, to wit:

32 In the United States Circuit Court of Appeals for the Seventh Circuit.

October Term, A. D. 1917.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY Company, defendants in error.	No. 2181.

Præcipe for record.

The clerk of this court is hereby directed to prepare a certified transcript of the record in the above entitled cause for the use of the United States Supreme Court, by including therein the following:

1. Copy of printed record filed herein.
2. All orders, judgments or decrees entered of record in said cause in the Court of Appeals.
3. Copy of printed opinion of Court of Appeals in case No. 2180, the United States, Plaintiff in Error, vs. Thomas C. MacMillan et al., defendants in error.
4. Copy of the opinion of the District Court herein.
5. Petition for writ of error.
6. Assignments of error.

7. Order allowing writ of error.
8. Writ of error.
9. Citation in error and acknowledgment of service of copy.
10. Præcipe for transcript and acknowledgment of service of copy.
11. Certificate of clerk to trascript of record.

33 Dated this 6th day of July, A. D. 1918.

CHARLES F. CLYNE,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

(Endorsed:) Filed July 6, 1918. Edward M. Holloway, clerk.

And afterwards, on the same day to wit, on the sixth day of July, 1918, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain notice of filing præcipe, which said notice is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

October Term, A. D. 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY, defendants in error. } No. 2181.

Notice of filing præcipe.

To JOSEPH H. DEFREES, GEORGE T. BUCKINGHAM, and MARQUIS EATON,
Attorneys for the defendants in Error:

Please take notice that on the 6th day of July, A. D. 1918, the undersigned filed with the clerk of this court a præcipe for the record to be transmitted to the Supreme Court of the United States on writ of error sued out in the above entitled cause, a copy of which præcipe is herewith served on you.

34 Dated this 6th day of July, A. D. 1918.

CHARLES F. CLYNE,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

Service of the within notice and copy of præcipe is hereby accepted this 6th day of July, A. D. 1918.

JOSEPH H. DEFREES, GEORGE T. BUCKINGHAM &
MARQUIS EATON,
Attorneys for Defendants in Error.
By DONALD DEFREES,
Attorneys for Thomas C. MacMillan.

In the United States Circuit Court of Appeals for the Seventh Circuit.

October Term, A. D. 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY, defendants in error. } No. 2181.

Præcipe for record.

The clerk of this court is hereby directed to prepare a certified transcript of the record in the above entitled cause for the use of the United States Supreme Court, by including therein the following:

1. Copy of printed record filed herein.
2. All orders, judgments or decrees entered of record in said cause in the Court of Appeals.
3. Copy of printed opinion of Court of Appeals in case No. 2180, the United States, plaintiff in error, vs. Thomas C. MacMillan, et al., defendants in error.

35 4. Copy of the opinion of the District Court herein.
5. Petition for writ of error.
6. Assignments of error.
7. Order allowing writ of error.
8. Writ of error.
9. Citation in error and acknowledgment of service of copy.
10. Præcipe for transcript and acknowledgment of service of copy.
11. Certificate of clerk to transcript of record.

Dated this 6th day of July, A. D. 1918.

CHARLES F. CLYNE,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

(Endorsed:) Filed July 6, 1918. Edward M. Holloway, clerk.

36 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 13, inclusive, contain a true copy of the proceedings had and papers filed, as called for in the præcipe for record filed, except the writ of error and the citation, the originals of which are hereto attached; and the opinion of this court in cause No. 2180, The United States vs. Thomas C. MacMillan, et al., and the opinion of the District Court of the United States for the Northern District of Illinois, in this cause, copies of which are

hereto attached in the case of The United States vs. Thomas C. MacMillan and The Empire State Surety Company, No. 2181, October term, 1917, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this eighth day of July, A. D. 1918.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

37 In The United States Circuit Court of Appeals, for the Seventh Circuit.

October term, A. D. 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THOMAS C. MACMILLAN and THE EMPIRE STATE SURETY COMPANY, defendants in error. } No. 2181

Writ of Error, United States Supreme Court to United States Circuit Court of Appeals, Seventh Circuit.

The President of the United States to the honorable the judges of the United States Circuit Court of Appeals, Seventh Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, Seventh Circuit of the United States, before you or some of you at the October term, 1917, thereof, between the United States of America, plaintiff in error, and Thomas C. MacMillan and The Empire State Surety Company, defendants in error, a manifest error hath happened, to the great damage of the said United States of America, plaintiff in error, as by its said complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,
38 so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of July, in the year of our Lord one thousand nine hundred and eighteen.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk, United States Circuit Court of Appeals, Seventh Circuit.

Allowed by Francis E. Baker, Circuit Judge, United States Circuit Court of Appeals, Seventh Circuit.

UNITED STATES OF AMERICA,
Seventh Judicial Circuit, ss.

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this eighth day of July, A. D. 1918.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Endorsed on cover:) In the United States Circuit Court of Appeals for the Seventh Circuit. The United States, plaintiff in error, vs. Thomas C. MacMillan and The Empire State Surety Company, defendants in error. No. 2181. Writ of error, United States Supreme Court to United States Circuit Court of Appeals, Seventh Circuit. Filed July 6, 1918. Edward M. Holloway, clerk.

40 In the United States Circuit Court of Appeals for the Seventh Circuit.

October term, A. D. 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY, defendants in error. } No. 2181.

Citation in error.

UNITED STATES OF AMERICA, *ss:*

To Thomas C. MacMillan and The Empire State Surety Company, defendants, in error, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of Appeals of the United States, Seventh Circuit, Chicago, Illinois, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered

against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Francis E. Baker, judge of the Circuit Court of Appeals of the United States for the Seventh Circuit, this 6th day of July, in the year of our Lord one thousand nine hundred and eighteen.

FRANCIS E. BAKER,
Circuit Judge.

41 Service of the foregoing citation is hereby acknowledged this 6th day of July, A. D. 1918.

JOSEPH H. DEFREES,
GEORGE T. BUCKINGHAM,
and MARQUIS EATON,
Attorneys for
By DONALD DEFREES,
THOMAS C. MACMILLAN.

42 (Endorsed on cover:) In the United States Circuit Court of Appeals for the Seventh Circuit. The United States, plaintiff in error, vs. Thomas C. MacMillan et al., defendants in error. No. 2181. Citation in error. Filed July 6, 1918. Edward M. Holloway, clerk.

43 In the United States Circuit Court of Appeals for the Seventh Circuit.

October term and session, 1917. No. 2180.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* THOMAS C. MACMILLAN, BERNARD A. Eckhart, and D. A. Cameron, defendants in error.	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before BAKER, KOHLSAAT and ALSCHULER, *cir. JJ.*:
Per Curiam.

Suit was brought by the United States on the official bond of Thomas C. MacMillan, clerk of the United States District Court for the Northern District of Illinois, the alleged breach of the bond being that for the period between January 27, 1910, and August 1, 1910, he received and did not turn over to the Government interest to the amount of $368.86 on public monies which came to him as such clerk, such monies being (a) fees paid to him under the bankruptcy laws of the United States; (b) monies paid to him as his emoluments and fees under various statutes of the United States, and (c) monies paid to him as clerk by various litigants, under various statutes and under the rules of the Department of Justice. To the

plea of the defendant, the Government interposed a demurrer, which the court overruled, and the Government electing to stand by its demurrer, judgment was entered for defendant. The issues are more fully stated in the opinion of Judge Geiger in the district court, upon the overruling of the demurrer. 209 Fed. 266.

44 We are in accord with the views expressed in that opinion, and with the conclusion reached by the district court. Since the oral argument in this court, our attention has been directed to an opinion of the Comptroller of the Treasury (Vol. XXIII, p. 732, June 13, 1917), wherein the question considered was the charging of the account of the clerk of the United States District Court for the District of Massachusetts with interest received by him on deposits in banks of the earnings of his office, pending the making of his returns. Mainly on the authority of United States v. Hill, 120 U. S. 169, and 123 U. S. 681, and United States v. Mason, 218 U. S. 517, as well as on the authority of Judge Geiger's opinion (which opinion was based largely upon the cases cited), the Comptroller found that it "seems to be fairly well established that interest monies accruing on money collected by a clerk for official services rendered, and held by him pending his semiannual return do not constitute emoluments of the clerk's office to be accounted for to the United States," and he affirmed the prior decision of the department auditor, which was against the Government's contention.

The judgment of the district court is

AFFIRMED.

A true copy.
Teste:

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

45 District Court of the United States, Northern District of Illinois, Eastern Division.

U. S. v. Thomas C. MacMillan et al.—No. 10622.
U. S. v. Thomas C. MacMillan et al.—No. 10623.
U. S. v. Thomas C. MacMillan et al.—No. 10624.
U. S. v. Thomas C. MacMillan et al.—No. 10625.
U. S. v. Edward M. Holloway et al.—No. 10626.
U. S. v. Edward M. Holloway et al.—No. 10627.
U. S. v Edward M. Holloway et al.—No. 10628.
U. S. v. Marshall E. Sampsell et al.—No. 10629.
U. S. v. Marshall E. Sampsell et al.—No. 10630.

These nine actions in the form of debt, four of them against the present, two against a former clerk of this court, three against the clerk of the Circuit Court of Appeals, and each of their respective bondsmen, are brought by the Government upon alleged breaches of official bonds. The declarations aver such breaches to consist of

failures to account and pay over to the United States specified sums of money "derived from payments made to the respective clerks," for and on account of interest on public moneys intrusted to "said clerks in their respective official capacities as clerks," to wit:

(a) Moneys paid to the clerk as his fees under the bankruptcy laws of the United States, and

(b) Moneys paid to the clerk as his fees, and compensation as his emoluments as clerk under the various statutes of the United States, and

(c) Moneys deposited with the clerk by various litigants in said District Court under and by virtue of certain rules of said court, and

The aggregate sum of interest moneys default in whose payment to the Government is so averred is further characterized as having been "paid to him (the clerk) for the use of the said moneys collected and held by him as clerk as aforesaid under the laws of the United States," etc., and "the same is and was no part of any sum or sums earned by him * * * (the clerk) as such clerk, but was in fact and is the property of the United States."

46 To the several declarations pleas were interposed, each setting up, in brief:

That there came into the possession and custody of the defendant clerk, and was deposited by him in various banks while he was in such custody and possession, certain moneys, referred to as the aggregate principal, composed of and coming from various sources, viz:

"(a) Moneys paid to the clerk as clerk's fees and compensation, under the bankruptcy laws of the United States; and

"(b) Moneys paid to the clerk as his fees and compensation, and as his emoluments as clerk, under various other statutes of the United States; and

"(c) Moneys deposited with the clerk by various litigants in said District Court, under and by virtue of certain rules of said court, hereinafter referred to.

"That on the average balances of said 'aggregate principal' so remaining from day to day on deposit, the clerk received interest at the rate of two (2) per cent, said interest so received being the said * * * (sum) mentioned in the declaration, and no other.

"That as to the money included in items (a) and (b) and in that portion of item (c) which was, after its deposit, paid to the clerk as clerk's fees, emoluments or compensation as hereinafter mentioned (and which portion is hereinafter for convenience referred to as fund 'd') the clerk did on the first day of each January and July of each year, or within thirty days thereafter, during all the time mentioned in the declaration, and in all respects as provided by statute, make a written return to the Attorney General of the United States, on a form prescribed by the latter, for and covering the next preceding semi-annual period, of all the fees and emoluments of his said office as clerk of said District Court, and included in the same

all of the moneys composing said items (a) and (b) and that portion of item (c) paid to the clerk as fund 'd.'

"That each of said returns included also a statement of the necessary expenses of said office during the same respective semi-annual period, including necessary clerk hire (and including his own compensation as allowed by law), and was accompanied by vouchers for and showing the payment of the same; that each said return particularly stated the amounts for the respective preceding half year of all fees and emoluments received, and of all of said necessary expenses paid out, which expenses were deducted on said state-
47 ment from the entire amount of all said fees and emoluments received; that the surplus money then remaining, and thus shown, was in each said half year period, and immediately after said return was made, to wit, on the same day, paid into the Treasury of the United States, or to the Subtreasurer of the United States, as was then directed by the Attorney General, and said surplus thus shown and accounted for and paid was in each case reecived by the United States.

"And the said interest received by the clerk in each said semi-annual period earned and accrued as aforesaid upon said items (a) and (b), and upon that portion of item (c) above mentioned as fund 'd,' was so earned and accrued before, and not after, the said fees and emoluments composing the said items had been so included in and made the subject of said return and had formed the basis of the computation and ascertainment of said surplus."

The pleas (of the defendants, clerks of the District Court) further set out the court rules, which provide for the deposit by plaintiffs with the clerk of the sum of twenty-five dollars, to be applied to the payment of accruing costs; for the deposit by defendants appearing separately of the sum of five dollars for the payment of defendant's costs that may accrue; for the receipt by the clerk of moneys paid to be applied on judgments, subject to the clerk's right to take one per cent thereof as earnings of the office; for the accounting of interest on such latter sums upon motion of a party—no such interest to be accounted for without the order of the court; for the repayment to original depositors of unexpended balances remaining in the clerk's hands after expiration of a specified time. The pleas proceed:

"That said item (c) was composed entirely of money paid to the clerk by litigants in said court, under and by virtue of said court rules above mentioned, and for the purpose of being disbursed by the clerk.

"To himself as fees or compensation allowed by law; and to the marshal and other court officers as their respective fees or compensation alowed by law; and to other persons and for other purposes connected with litigation as the same should be from time to time by said court directed.

"That all of the fees and emoluments earned by the clerk and to which he became entitled to be paid and which he was paid out of

said item (c) were by him included in and specified in his said respective semi-anual returns and reports as aforesaid.

48 "That that portion of the money composing said item 'c' which was composed of said fees and compensation of the marshal and other court officers, and said sums directed by the court to be paid to others, was all, by the clerk, paid to those court officers entitled to the same as and when the same was by such officer earned or was paid to such other person when and as the court directed the same to be paid to them, as the case might be, said portion being herein called and referred to as fund 'e.'

"That the money composing the residue of said item (c), other than fund 'd' and fund 'e,' was by the clerk paid out to the persons depositing the same, or to their successors entitled thereto, under and by virtue of said court rule, as and when the same was and became payable.

"That of the said sum of money composing item (c) that portion earned by and paid to the clerk as fees and emoluments earned by him as clerk (being fund 'd') was in each case included in and settled for in the respective semi-annual returns as aforesaid."

The Government has demurred to each plea, and all of the cases are now before the court upon such demurrers.

GEIGER, *District Judge.*

From the declarations and pleas we may summarize that the funds, which we may term the "principal," received by the clerks and deposited in the banks and whereon the interest was earned, may be classified into (a) moneys deposited by litigants with the clerk subject to be disbursed to himself or to others as occasion may demand in the course of the litigation; (b) fees and emoluments earned by the clerk and paid to himself out of such last above specified deposits—and, as to such earned fees and emoluments, a semi-annual account was rendered, the account being charged to himself, and against the same was credited the office expense, the compensation retainable ($3,500.00 per annum), and the surplus remaining, which latter was always paid to the Government.

To put it in another way, the interest moneys in question arose from bank deposits which were constituted from two sources, first, moneys deposited by litigants who, until such moneys were actually covered into fees payable by them, retained the beneficial interest or ownership therein; and, secondly, the fees and emoluments before a surplus was ascertained and paid over.

What is the character or status, as between the Government,
49 the clerk, and the litigant, of the moneys received, upon which, when deposited in the banks, the interest moneys arose as stated. Are they public moneys whereof the clerk is trustee for the plaintiff Government? This is the fundamental question whose answer, if affirmative, will sustain, if negative, will overrule, the demurrers.

Exhaustive historical reviews of legislation respecting fees of clerks of the Federal courts, are found United States v. Hill, 120 U. S. 169; in United States v. Hill, 123 U. S. 681; United States v. Mason, 218 U. S. 517; and in considering the question now presented, no purpose will be served by repetition thereof. It will suffice to note that, prior to 1841, clerks were under no obligation to render any account of fees or emoluments to the Government. They retained all revenues so coming to their hands. But in that and subsequent years the legislation having the effect of limiting their earnings was inaugurated and continued. The cases cited, and others, deal with the intent embodied in such legislation, and, as will be seen, are persuasive in determining the status or character of the moneys or revenue which now, as prior to such legislation, came into clerks' hands in the discharge of official duties.

It will be assumed that the plaintiff seeks recovery of the interest money in its own right; that the failure to account for and pay it to the Government, is assigned as a breach by the respective clerks of an official obligation to be discharged by them to the plaintiff; that while, as seen from the statement of facts, the defendant clerks have assumed obligations toward litigants respecting the disbursement of deposited moneys and the return to such litigants of any unexpended portion, no breach of any such obligation is assigned as a basis for institution of suit by the Government on behalf of others; in other words, the plaintiff seeks recovery of the interest moneys "as the property of the United States." So too, it will be assumed that if the revenues coming to the hands of the clerks are in truth public moneys, the property of the Government, then any interest earned thereon, no matter when or how, rightfully follows the principal or corpus, as an incident or increment, in no event subject to personal appropriation by the custodian of the principal.

Considering first the interest money as arising upon a fund in part constituted from deposits made by litigants to be drawn against by the clerk for payment of fees as they accure, certainly neither the clerk nor the Government has any interest in such deposits, prior to proper appropriation for the uses intended, except to hold them Even admitting for the time being, that the fees when actually earned and paid are then public funds, the deposit made by a litigant to secure such payment, is in no proper sense a fund in or over which the Government has obtained the slightest proprietary interest or power of disposition. That interest and right is retained by the litigant, save only as he has surrendered it to the clerk to exercise by drawing against it in the defrayal of fees as and when, under the law, they accure and are chargeable against the litigant. While the transaction in making the deposit under the rule may not technically be a bailment, the clerk, in the nature of things, stands as a sort of insurer for the return to the litigant of the deposit or such part thereof as shall not have been earned as fees either by himself or others for whose benefit it is made. Certainly the deposit is not made

for the benefit of the Government. The clerk under the law is required to account for fee earned whether they are paid or not; and the rule does not impress such deposit with the character of public moneys or revenues; but is a mere regulation for the protection of the clerk, to guaranty to him in advance, and as an administrative convenience in the discharge of his duties of and in the payment of moneys primarily receivable by him as his compensation. As indicated, if these court rules for deposits were not in force, it would rest with the clerk to insist upon payment of each fee as it is earned, in advance. If he failed to collect, but accounted for it as earned, the loss is his. His failure actually to collect the money from the litigant, while it might so result in loss to him, would not, if he accounted for it to the Government, be a breach of any condition of his bond. So long, therefore, as the moneys deposited by the litigant retain their status as a security deposit, the Government has and can have no claim to any increment thereof by way of interest.

Coming now to the character or status of the other constituent of the fund upon which the interest money in question arose—the moneys earned by the clerk as official fees and emoluments and which, pending the semi-annual accounting and return were deposited in the banks. While it is true that in Bean v. Patterson, 110 U. S. 401, the Supreme Court upon an application for leave to docket an appeal, ruled that under an act substantially like that governing district court clerks, the clerk of the Supreme Court could demand payment of certain fees in advance; and declared that:

"As the law now stands the fees and emoluments of the
51 office (clerk of Supreme Court) belong to the Government subject only to the payment of the annual salary of the clerk, necessary clerk hire and incidental expenses, and the clerk is the collecting agent for the Government":

and while the Circuit Court of Appeals for the first circuit, in United States v. Mason, 129 Fed. Rep. 742, adopted this expression in considering certain items of a clerk's account as constituting a "necessary expense" of his office; nevertheless the question respecting the character or status of funds in the hands of a district court clerk prior to his semi-annual accounting, was directly presented in the recent case of United States v. Mason, 218 U. S. supra; and the ruling therein is, in my judgment, decisive of the present cases. It involved the validity of an indictment charging a clerk of a district court with embezzling funds in his hands; and required answer to the concrete question whether, before a surplus of moneys in the clerk's hands was ascertained and required to be paid over, the funds received by him were public moneys of the United States. A negative answer is given, based, as the court says, upon consideration of the "history of his (the clerk's) relation to these moneys and of the statutes which specifically define his rights and duties." Mr. Justice Hughes quotes the language found in United States v. Hill, supra:

"The clerk of a court of the United States collects his taxable 'compensation' not as the revenue of the United States, but as the fees

and emoluments of his office, with the obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any 'revenue law' properly so called, but out of a statute governing an officer of a court of the United States."

And proceeds:

"But, for the reasons we have stated, even the duty to pay the surplus shown by the return or audit is not governed by the statutes, relating to embezzlement, which have been referred to in support of these counts. The amount with which the clerk is chargeable upon his accounting is not the 'public money' or 'the money or property of the United States' within the meaning of their provisions. The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount 52 payable when the return is made the clerk is not trustee but debtor. Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent."

This language, it seems to me, leaves nothing further to be considered except the suggestion made by plaintiff that the interest moneys, being received upon funds which came to and were in the clerk's hands by virtue of his office, should be considered and accounted for as emoluments. What test is afforded in determining whether a sum of money received by an official is an emolument of his office? Certainly this—that the official do some act or perform some service pursuant to the obligation or sanction of his office to or for the benefit of the one paying the money charged to be an emolument; that the one paying the money has the right to exact from the official the rendition of the service, and the official has the right to exact the money return—under official obligation or sanction of the particular office to which the emolument is claimed to attach. To put it in another way—the payment moves to the official in consideration of the rendition by him of some official act or service, the official does the act or renders the service by virtue of his office. The official character of the act is his warrant for exacting the payment.

Now, while it is true that the incumbency of the office of clerk by an individual, his receipt of moneys for fees, emoluments or deposits by litigants, and the deposit thereof by the clerk in banks, all concur in furnishing or creating the occasion through which he receives interest on the funds in the bank, yet he is not required, therefore cannot and does not deposit the funds in the bank upon an interest paying basis by virtue of his official obligation; nor can or does he exact the interest from the banks under the sanction of official right or duty. Therefore such interest is not and cannot be an emolument.

In this connection it is further urged by the Government that, until the semi-annual return is made, the moneys received by the clerk for fees, court costs etc. belong "to the office of the clerk and not

his individual property." It is not possible that the "office" of clerk can be treated as an entity, apart from the Government or the clerk, having a proprietary interest or title in or to the funds. If the contention be that because the moneys are paid to and received by the clerk by virtue of his office and not individually, therefore they are not his individual property, the reply is aptly stated by Mr. Justice Hughes in the Mason case:

53 "There has thus been established a distinct system with respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. The consideration however does not aid the prosecution for they were attached to the office before the statute of 1841, when they belonged to the clerk without any duty to account for them."

This last observation suggests the query if, prior to the passage of these statutes, the clerk had deposited in the bank all moneys received by him as clerk and had received interest on his daily credit balance, could it reasonably be claimed that such interest money was an emolument of his office? It is my judgment that whatever effect these various statutes may have, they do not have the effect of transforming into fees and emoluments, payments which, prior to their passage, were not fees and emoluments received for the discharge of official duties. They furnish no new tests for determining the character of funds received by the clerk. Nothing demonstrates this more clearly than United States v. Hill, supra, and the amendment to the statute which ensued the rendition of that decision. There, a clerk of the district court by direction of the judge, rendered services by way of assistance in naturalization proceedings—the preparation of cases for hearing, examination of witnesses and the like, for which he collected compensation from the applicants. It was sought to compel him to account for the moneys thus received; but as the duties were held not to pertain to the office of clerk, he was held not obliged to include them in his return. The law as subsequently enacted by Congress declared such compensation subject to be accounted for as other fees and emoluments—doubtless to avoid the effect of the ruling referred to.

The conclusion to be drawn from the Mason case would therefore appear to be: That the statutes which have been passed since 1841 do not abolish, but on the contrary were and are intended fully to recognize and continue in force the preexisting system of compensating clerks of courts by means of fees and emoluments collected from persons who as litigants or otherwise are recipients of their official services; that the fundamental purpose of these statutes is (1) to place a limitation upon the aggregate amount of compensation which may be received by clerks through such system; (2) to

54 impose upon the clerks the obligation to pay to the Governments—of which they are officials—the excess beyond such limitation; (3) to provide the manner and means, semiannually, of reduc-

ing such obligation to concrete terms, by requiring returns, accounting and the like, and (4) the manner and means of securing performance by the clerks of the statutory obligation to pay the excess, if and when ascertained. This conclusion, and no other, is reconcilable with the Supreme Court's view that the clerk is not a trustee but a debtor, of the Government. Of course when a clerk has breached his obligation with respect to holding and properly disbursing moneys deposited by litigants, the power of the Government as obligee in the bond given by the clerk, to sue on behalf of and vindicate the litigant's rights, cannot be denied. United States v. Abeel, 174 Fed. Rep. 12. That does not impress the amount sought to be recovered with the character of public revenues. The bond is given to secure the faithful discharge of the official's duties, whatever they may be and to whomever they may be owing; and the fact the Government is obligee therein is of no importance save as a participation by it to make secure and effective the "distinct system" of having the features noted, viz, compensation of the clerk, not out *out* of public revenues, but by fees from litigants, with the obligation on the clerk to pay to the Government the excess over a specified amount.

The conclusion is that the demurrers must be overruled, and orders may be entered accordingly, in each of the nine cases.

F. A. Geiger, *Judge.*

(Endorsed:) Filed November 18, 1913, at 8.40 o'clock a. m. T. C. MacMillan, clerk.

(Endorsed on cover:) File No. 26,647. U. S. Circuit Court Appeals, 7th Circuit. Term No. 561. The United States of America, plaintiff in error, vs. Thomas C. MacMillan and The Empire State Surety Company. Filed July 15, 1918. File No. 26,647.

○

CONTENTS.

	Page.
Statement of the case	1–4
Specification of error	4–5
Argument	5–26
I. The clerk of the District Court for the Northern District of Illinois during the period involved was a salaried officer of the United States, expressly prohibited by law from receiving any additional pay, allowance, or compensation	5–10
II. The moneys included in the clerk's semiannual returns, on which interest was collected and retained, were received by defendant in his official capacity as clerk. He is therefore bound to account for the interest so collected as "emoluments" of his office	10–18
III. The United States, as obligee on the clerk's bond, may maintain a suit against the clerk and his surety for failure to account for interest collected and retained on moneys deposited by litigants subject to disbursement	18–26
Conclusion	26

CASES CITED.

Alexander v. *United States*, 43 Ct. Clms. 389	11, 12
Apple v. *Crawford Co.*, 105 Pa. St. 303	14
Board of Supervisiors v. *Wandel*, 6 Lans. (N. Y.) 33	21
Comp. Dec., Vol. XXIII, p. 732	13
Eshelby v. *Board of Education*, 66 Ohio 71	21, 26
French v. *Senate*, 146 Cal. 604, 69 L. R. A. 556	7
Garley v. *People*, 28 Colo. 227	26
Hogan v. *Ross*, 13 How. 173	18
Howard v. *United States*, 184 U. S. 676	20, 22–23
Hoyt v. *United States*, 10 How. 108	8, 10. 13–14
Hughes v. *The People*, 82 Ill. 78	16–17
Hunt et al. v. *The State*, 124 Ind. 306	17–18

Page.

In re Moneys, etc., 170 Fed. 470 19
Lewis v. *United States*, 244 U. S. 134 8–10
Long v. *Kansas City & Ry. Co.*, 170 Ala. 635 25
Louisville & Nashville R. R. Co. v. *Palmes*, 109 U. S. 244 7
Mobile & Montgomery R. Co. v. *Jurey*, 111 U. S. 593 .. 25
Nash v. *Faulkner*, 107 N. Y. 477 26
Pearcy v. *Stranahan*, 205 U. S. 257 7
Rhea v. *Brewster*, 130 Iowa 729 ..... 18, 20–21, 26
Southern R. Co. v. *Blunt & Ward*, 165 Fed. 258 25
Southern R. Co. v. *Covenia*, 100 Ga. 46, 40 L. R. A. 253 7
State v. *McFetridge*, 84 Wis. 473 22–26
United States v. *Abeel*, 174 Fed. 12 ..... 11, 19, 20, 23–25
United States v. *Davis*, 243 U. S. 570 20
United States v. *Hill*, 120 U. S. 169 11–12
United States v. *King*, 147 U. S. 676 10
United States v. *Mason*, 218 U. S. 517 ..... 11, 12–13
United States v. *McMillan*, 165 U. S. 504 11
United States v. *MacMillan*, 209 Fed. 266 ..... 4, 26
United States v. *Oliphant*, 230 Fed. 1 12
Vansant v. *State*, 96 Md. 110 14–16
Webb v. *Southern Ry. Co.*, 235 Fed. 578 25

STATUTES CITED.

Act of March 3, 1831, 4 Stat. 492 9
Act of July 31, 1894, 28 Stat. 204 ..... 4, 6, 7, 10
Act of June 28, 1902, 32 Stat. 475 ..... 12, 13
Act of February 5, 1903, 32 Stat. 799 18
Act of June 30, 1906, 34 Stat. 754 19
Act of August 24, 1912, 37 Stat. 417 6–7
Revised Statutes, Sec. 995 19
Revised Statutes, Sec. 996 (as amended) 19
Revised Statutes, Sec. 1765 ..... 4, 8

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, plaintiff in error,
v.
THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY.
No. 167.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a suit by the United States upon the official bond of the defendant Thomas C. MacMillan, as clerk of the district court of the United States for the Northern District of Illinois, and is brought against him and his surety, the Empire State Surety Company.

The declaration alleges that the said Thomas C. MacMillan did not faithfully discharge the duties of his office and properly account for all moneys coming into his hands as clerk of the said district court, in that, during the period between December 27, 1905, and January 27, 1910, while acting as

such clerk and under bond, as aforesaid, he failed to account for a sum of $3,861.05 which came into his hands in his official capacity as clerk.

As alleged in said declaration the moneys not accounted for "were derived from payments made to the said Thomas C. MacMillan for and on account of the interest on public moneys and moneys entrusted to said Thomas C. MacMillan, in his official capacity, as said clerk, to wit, (*a*) moneys paid to the clerk as fees under the bankruptcy laws of the United States, and (*b*) moneys paid to the clerk as his fees and compensation and as his emoluments as clerk under various statutes of the United States, and (*c*) moneys deposited with the clerk by various litigants in said district court under and by virtue of certain rules of said court." (Rec. 4.)

Defendants by their plea (describing therein the (*a*) moneys as "moneys paid to the clerk as *clerk's fee and compensation*, under the bankruptcy laws of the United States"), admit that the moneys set out in the declaration came into the possession and custody of MacMillan, and were deposited by him in various banks; and that on said moneys, so on deposit, the clerk received interest at the rate of 2 per cent, which constituted said sum of $3,861.05 mentioned in the declaration. (Rec. 9.)

The plea further sets forth that said clerk, during said period, on the first day of January and July of each year, or within 30 days thereafter, made a written return to the Attorney General of all fees and emoluments of his office; that each of said returns

included a statement of the necessary expenses of his office for the semiannual period, including necessary clerk hire (*and including his own compensation*), and was accompanied by vouchers for, and showing the payment of, the same; and that in each said return said necessary expenses so paid out were deducted from the entire amount of fees and emoluments received, and the surplus of money then remaining was immediately thereafter paid into the Treasury of the United States. (Rec. 10.)

As regards that portion of the (*c*) moneys—moneys deposited by litigants—consisting of fees and compensation payable to the marshal and other officers of the court, the plea alleges that the same was paid by the clerk to the officers entitled thereto as and when the same was earned; that the remainder of said (*c*) moneys, after payment of the fees and compensation of the clerk and other officers, as aforesaid, was paid out to the persons depositing the same, or their successors entitled thereto, under and by virtue of the rules of said court; and that, so far as that portion of said moneys consisting of clerk's fees, etc., is concerned, the same was included in and settled for in said semiannual returns. (Rec. 12.)

The plea does not allege that the clerk included in his returns to the Attorney General, or accounted for, or paid over to the United States, or any person entitled thereto, the $3,861.05 of interest accruing on said moneys and received by the clerk from the various banks in which the same were on deposit; and

the case was decided by the courts below on the theory that the clerk was not required by law to account to the Government for the interest so accruing.

To this plea the United States filed a demurrer, which was overruled by the district court, Judge Geiger presiding (Rec. 34–42; 209 Fed. 266); the United States, electing to stand on its demurrer, carried the case to the Circuit Court of Appeals for the Seventh Circuit, where the judgment was affirmed *per curiam* (Rec. 33–34). From said judgment the Government prosecutes this writ of error.

Specification of Error.

The Circuit Court of Appeals erred:

1. In not reversing the judgment of the United States District Court for the Northern District of Illinois.

2. In failing to take judicial notice of the fact that the said Thomas C. MacMillan, under the act of Congress of July 31, 1894 (28 Stat. 204), was an officer whose compensation was fixed by law, and that he was therefore prohibited by section 1765 of the Revised Statutes from receiving and retaining any part of the amount herein sued for.

3. In refusing to hold that the moneys included in the clerk's semiannual return on which said interest was collected and retained by the said clerk prior to being so included, did not belong to the said clerk and that he must account for the interest received thereon to the United States.

4. In not holding that all moneys entrusted to the said clerk by litigants and bankrupts, not included in his semiannual emolument returns, are trust funds for which the said clerk as bailee or trustee under said bond must account to the United States, including said moneys received thereon as interest and appropriated to his own use. (Rec. 26–27).

ARGUMENT.

I.

The clerk of the District Court for the Northern District of Illinois during the period involved was a salaried officer of the United States, expressly prohibited by law from receiving any additional pay, allowance, or compensation.

Defendants' plea, averring the clerk's disposition of funds received, after defining "necessary expenses," includes in parentheses the words "and including his own compensation, as allowed by law," and then allege that the surplus over and above such "necessary expenses" was accounted for and paid into the Treasury, thus giving the impression that the clerk, MacMlan, occupied the same relation to the United States as the clerks in other districts who derive their compensation from the earnings of their offices, and retained out of the fees and emoluments of his office, in addition to "necessary office expenses," his own compensation as allowed by law, and accounted to the Attorney General only for the balance remaining. The decision of the district court in this case proceeds on this theory. (Rec. 37–38.)

The statutes governing this particular clerkship show that such, however, is not the fact. Prior to 1894 this clerk, in common wtih all others, derived his compensation entirely from the earnings of his office. But during the period from 1894 until 1912, which includes the period involved in this suit, he was *sui generis* among the clerks of Federal Courts. Whereas other clerks accounted for their fees and emoluments less their necessary office expenses and the amount of their compensation, the clerk for this district accounted for all fees and emoluments less necessary expenses, and received his compensation by check drawn upon the Treasurer of the United States.

The act of July 31, 1894, making said clerk a salared officer, apparently was not called to the attenion of the district judge in this case or considered by him. It provides:

> The judge of the District Court fo the Northern District of Illinois shall be authorized to appoint a clerk of such court at an annual salary of three thousand dollars, which amount is hereby appropriated. (28 Stat. 204.)

The clerk for the Northern District of Illinois remained in this situation, appropriations for his salary being annually made, until July 1, 1912, when he was again placed on the same basis as other clerks. The Sundry Civil Appropriation Act for 1913 provides as follows:

> On and after July first, nineteen hundred and twelve, the clerk of the District Court for

the Northern District of Illinois shall be compensated for his services as such clerk as other clerks of United States district courts are compensated. (37 Stat. 417, 465.)

The above quoted language of the plea, if interpreted to mean that the clerk retained his compensation out of the fees and emoluments of his office, constitutes an allegation of fact impossible in law, of which the court will take judicial notice, and which is not admitted by the demurrer. *Louisville & Nashville R. Co.* v. *Palmes*, 109 U.S. 244; *Pearcy* v. *Stranahan*, 205 U. S. 257; *French* v. *Senate*, 146 Cal. 604, 69 L. R. A. 556; *Southern R. Co.* v. *Covenia*, 100 Ga. 46, 40 L. R. A. 253.

However, it is possible to give to the plea an interpretation which will obviate this objection, which is probably entirely consistent with the facts. The clerk may have retained his compensation out of funds on hand and endorsed his salary check over to the Treasurer of the United States along with the surplus of earnings over "necessary expenses;" in other words, he may have cashed his salary check out of his surplus funds on hand and used it as cash to settle his accounts.

As this construction comports with the statute, and the other contradicts it, the language of the plea must receive the interpretation consistent with the law.

In any event it is evident that by virtue of the Act of July 31, 1894, the said clerk during the period from 1905 to 1910 derived no part of his compensation

from the earnings of his office but was a salaried officer of the United States. As such he was clearly subject to the provisions of section 1765 of the Revised Statutes, limiting a public officer's compensation to that authorized by law. Said section provides:

> No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefore explicitly states that it is for such additional pay, extra allowance, or compensation. (Comp. Stat., sec. 3234.)

Of this statute, it was said by this court in *Hoyt* v. *United States*, 10 How. 108:

> It is impossible to misunderstand this language, or the purpose and intent of the enactment. It cuts up by the roots these claims by public officers for extra compensation, on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of Congress. The prohibition is general, and applies to all public officers, or *quasi* public officers, who have a fixed compensation. (P. 141.)

In the case of *Lewis* v. *United States*, 244 U. S. 134, it appears that Lewis was surveyor general of Louisi-

ana and was so appointed and commissioned on or about July 18, 1905, to that office, which he had previously held, and thereafter continuously held up until July 15, 1909. The act of Congress of March 3, 1831 (4 Stat. 492) provided, among other things, that:

> The surveyor general . . . shall be allowed an annual salary of two thousand dollars . . . and that the fees heretofore authorized by law for examining and recording surveys be, and the same are hereby, abolished . . . and for every copy of a plat of survey, there shall be paid twenty-five cents, and for any transcript from the records of said office, there shall be paid at the rate of twenty-five cents for every hundred words by the individuals requiring the same.

The act of 1831, placing Lewis upon a salary basis, made no provision for the disposition of the fees which he was authorized and directed to collect. It had been the custom of Lewis and his predecessors in office to retain these fees as their personal compensation. This practice continued until May, 1907, after which the Commissioner of the General Land Office required that such fees be paid into the Treasury. Lewis sought to recover the fees for the period from May 1, 1907, to June 1, 1909, in addition to his salary.

The court said:

> We are of opinion that section 1765 of the Revised Statutes (Comp. Stat. 1916, sec. 3234), above quoted, prevents the allowance of the claim for fees. This section is general

> in its application, and fixes the compensation of officers of the United States at the salary established by law, unless the additional compensation is authorized and explicitly appropriated for. No such law or appropriation is shown in this case. (244 U. S. 146.)

This provision is, of course, equally applicable to an officer who receives a fixed compensation from the fees and emoluments of his office (*Hoyt* v. *United States*, 10 How. 108); and has been held to apply to a clerk of court who derived his compensation in this way (*United States* v. *King*, 147 U. S. 676). The case, therefore, is one of importance as applicable to all clerks of court. The fact that the defendant in the present case was on a salary basis, and derived no part of his compensation from the earnings of his office, emphasizes the applicability of the statute; is additional evidence of the purpose of Congress to limit his compensation to that authorized by law, and presents the question in its clearest form.

II.

The moneys included in the clerk's semiannual returns, on which interest was collected and retained, were received by defendant in his official capacity as clerk. He is, therefore, bound to account for the interest so collected as "emoluments" of his office.

The clerk upon being appointed under the act of July 31, 1894, ceased to have any ownership in or claim upon the fees or emoluments of his office for his personal compensation. He thereupon became obli-

gated to account to the United States for all such fees and emoluments over and above the "necessary expenses" of his office. Unless this case may be said to constitute an exception to the general rule that the interest follows the principal or corpus, the interest on such fees belongs to the United States, the sole owner of the corpus after deduction of said "necessary expenses."[1] *United States* v. *McMillan*, 165 U. S. 504; *United States* v. *Abeel*, 174 Fed. 12; *United States* v. *Mason*, 211 Fed. 233; affirmed C. C. A., Eighth Circuit, 219 Fed. 547; *Alexander* v. *United States*, 43 Ct. Clms. 389, 395.

It will be well, at the outset, to distinguish the cases of *United States* v. *Hill*, 120 U. S. 169, and *United States* v. *Mason*, 218 U. S. 517, relied on by the district court.

In the *Hill case*, after reviewing the statutes requiring clerks of court to account for all fees and emoluments over a fixed amount, the court held that the clerk of the District Court for Massachusetts was not bound to account for fees received in naturalization cases. The ground of decision was, that since the various clerks, with the acquiescence of the judges and of the executive branch of the Government, had uniformly omitted such fees from their returns, such long standing practice amounted to a

[1] The funds (principal) upon which the interest in question accrued may be summarized as (*a*) fees and the emoluments of the clerk for which the clerk was bound to account to the United States; and (*b*) moneys deposited by litigants with the clerk subject to be disbursed to himself or others as provided by law, or the judgment of the court. The question as to the interest accruing on the (*b*) moneys will be considered under the next succeeding head. (*Infra*, p. 18.)

contemporaneous construction of the statute requiring such returns, which the court would not overturn. By an amendment to the statute in question, dated June 28, 1902 (32 Stat. 475; Comp. Stat. sec. 1398), it was provided that the word "emoluments," as used therein, "shall be understood as including . . . all amounts received for services in naturalization proceedings . . . and all other amounts received for services in any way connected with the clerk's office." This provision, it has been held, was enacted "with an evident intent to nullify" the decision in the above case. *United States* v. *Oliphant*, 230 Fed. 1, 7–8; *Alexander* v. *United States*, 43 Ct. Clms. 389, 396.

The *Mason Case* involved an indictment against the clerk of the District Court in Massachusetts for alleged embezzlement of the fees and emoluments of his office prior to including them in his return. The court, following the *Hill Case*, held that the statutes limiting a clerk's compensation to a fixed amount had not changed the relation of the clerk to the fees and emoluments collected by him; and that such fees and emoluments, while in the hands of the clerk and unaccounted for, were not, strictly speaking, the property of the United States, but a fund from which the clerk receives his compensation and expenses, and as to the remainder of which he must account to the United States, not as trustee, but debtor. Accordingly, the court upheld the judgment of the lower court in sustaining a demurrer to the indictment, but in so doing was careful to observe:

> We have not before us a case where a clerk has refused or failed to make the return required by statute or to pay over the surplus shown by his return to exist. (218 U. S. 530.)

The obligation of the clerk to account for the principal or corpus being clear, what reason exists for contending that he is not also bound to account for the interest accrued thereon? The logical view would seem to be that such interest constitutes an "emolument" of his office for which he should account along with the other fees and emoluments. While, apparently, there is no Federal decision holding such interest to be an emolument, the term would seem to be broad enough to include it, particularly in view of the statutory definition given the term in the abovementioned act of June 28, 1902, *supra*, p. 12.[1]

The meaning of the term "emolument" was under consideration by this court in the case of *Hoyt* v. *United States*, 10 How. 109, 135. The court said:

> The provision in this act, therefore, that whenever the annual emoluments, after dededucting the expenses, exceeded the amount of five thousand dollars, the excess should be accounted for, necessarily embraces in the limitation the fees as well as commissions belonging to the office, and would have embraced also the fines and forfeitures, had it

[1] The opinion of the Comptroller of the Treasury, cited in the memorandum of the Circuit Court of Appeals (Rec. 34) was based upon the opinion of the district judge in the present case, and is not, therefore, an independent opinion. XXIII Comp. Dec. 732.

> not been for the proviso to the act taking them out of the limitation.
>
> The argument would be quite as strong in favor of excluding the commissions as in the case of fees, as the one can in no more appropriate sense be regarded as emoluments of office than the other, and thus the limitation would become a nullity.
>
> These terms denote a compensation for a particular kind of service to be performed by the officer, and are distinguishable from each other, and are so used and understood by Congress in the several compensation acts; they are also distinguishable from the term *emoluments*, that being more comprehensive, and embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office; and such is the obvious import of it in these acts.

The word "emolument" also is defined in the case of *Vansant* v. *State*, 96 Md. 110, 128, as follows:

> So "emolument" is said in *Apple* v. *Crawford County*, 105 Pa. St. 303, to import "any perquisite, advantage, profit, or gain arising from the possession of an office," and, as we have have seen, the clerk is expressly required to account for "emoluments."

The subject was very carefully considered by the Court of Appeals of Maryland in the case of *Vansant* v. *State, supra*, in which it was expressly held that a clerk should account for interest on moneys deposited by him as "emoluments." Vansant was clerk of the court in the city of Baltimore and retained

interest at the rate of 2 per cent on funds collected by him for the use of the State and deposited by him in bank. The court said:

> Independent of any authorities on the subject, there would seem therefore to be but little room to question the liability of the clerk for interest received by him on funds collected by him for the use of the State and deposited in bank. It would be a most dangerous practice to sanction, to permit him to retain such interest, and if the law were otherwise than what we determine it to be, the safety of the public money would demand additional legislation on the subject. If a clerk can deposit money in bank and receive one or two *per centum* interest on it for its own use, what would hinder him from lending it to individuals or other corporations at a higher rate of interest? * * * The temptation to get higher interest is illustrated in this case, where it is shown that the bank which paid one *per centum* had an insignificant portion of these funds, as compared with those which paid two *per centum*. Then, too, the position taken by the appellants would be a great inducement to postpone the payment of the public moneys to the State as long as possible. Clerks are required by the Statute to pay over what they have received on the first Mondays in March, June, September, and December, and this record shows that this clerk did not pay over these large amounts until the end of June, and he was getting interest on them for nearly a month after they were payable by the

very terms of the Statute. It is true that the Statute only provides for the penalties if the public money is not paid within thirty days after the dates named, but it was payable to the State on those days, and especially in June, when the bulk of the license money is to be accounted for it should be paid promptly and there should be no such inducement to postpone payment as there would be if clerks and other officers are permitted to profit by keeping the money in bank thirty days after it was payable. (Pp. 128–129.)

* * * * *

2. Having decided that the clerk is responsible, is the surety on his bond liable for the interest thus received by him?

We are of the opinion that it is. From what we have said, it will be seen that we deem this interest to be an "emolument" of the office. (P. 130.)

The principle that the interest on funds of this character belongs to the State, and that clerks of court should not receive any compensation above the maximum fixed by the statutes, is adhered to in the case of *Hughes* v. *The People*, 82 Ill. 78, in which a sheriff of a county received money as commissions on tax money deposited by him in bank, and retained same in addition to the compensation allowed him. The court, in considering this case in its opinion, at page 80 says:

It follows, therefore, when the county court of St. Clair County fixed the compensation of appellant at three thousand dollars

per annum, and two thousand and five hundred dollars additional for clerk hire, to the total of these amounts was appellant entitled. He could claim nothing beyond them, and all sums beyond that total were payable into the treasury of the county.

It appears appellant received from a banking institution the sum of twenty-five hundred dollars as compensation for the deposits he made therein of moneys which came to his hands as sheriff, and it is claimed by him he is not accountable for this sum to the county.

The money was received by him as a perquisite or emolument of his office as sheriff—this is not questioned. The statute on this subject leaves the point free from doubt. Section 52 of the act of 1872, title "Fees and salaries," provides as follows: "All fees, perquisites, and emoluments received by said county officers, above the amount of compensation fixed by the county board, and clerk hire and other necessary expenses, shall be paid into the county treasury." R. S., 1874, p. 522, chap. 53.

This being a perquisite or emolument acquired by official position, should be accounted for to the county. (P. 80.)

The Supreme Court of the State of Indiana, in the case of *Hunt et al.* v. *The State*, 124 Ind. 306, 308, wherein the city treasurer loaned funds of the city and collected interest thereon and failed to account for same, said:

He could not make a loan of city funds in his official capacity which would enure to his

> individual benefit; his official acts belonged to the city of which he was an officer, and whatever benefits were derived therefrom enured to the city. The money sued for being money coming into his hands in his official capacity, the appellant and his sureties are liable on their bond therefor.

These authorities establish the duty and obligation of the clerk to account for and pay over to the United States all moneys received by him as fees and emoluments of his office, including all interest received thereon. To the same effect are *Rhea* v. *Brewster*, *infra* p. 20, and the cases therein cited.

III.

The United States, as obligee on the clerk's bond, may maintain a suit against the clerk and his surety for failure to account for interest collected and retained on moneys deposited by litigants subject to disbursement.

The trust funds here included on which interest was retained by the clerk were those received by the clerk as fees of the referees and trustees under the bankruptcy law,[1] together with certain moneys be-

[1] While in our view of the case the point is not important, we deem it our duty to call attention to the fact that the declaration alleged that the interest accrued, among others, on "(*a*) moneys paid to the clerk as fees under the bankruptcy laws of the United States," which allegation included not merely the $10 clerk's fees in such cases but also the fees of referees and trustees as provided for by the bankruptcy law (Act of February 5, 1903, 32 Stat. 799; Comp. Stat., secs. 9624 and 9632); and that the plea, while professing to respond to the entire declaration, described said (*a*) moneys as "moneys paid to the clerk as *clerk's fee and compensation under the bankruptcy laws of the United States*" (*supra*, p. 2).

"It is a settled rule in pleading that wherever a plea in its commencement professes to respond to the entire declaration or count, and is in substance and reality an answer to part only of such declaration or count, the plea is bad, and the defect may be availed of, upon demurrer." *Hogan* v. *Ross*, 13 How. 173, 181–182.

longing to divers litigants who had deposited the same with the clerk to secure the payment of court costs, witness fees and other expenses, and continued to be the property of the referees, trustees and litigants in the possession of the clerk until they were used for the payment of court costs, witness fees and other expenses, or were subsequently returned by the clerk to the litigants. If these deposits remained unclaimed by the persons entitled thereto for a period of five years they then become subject to an order of court to cause the same to be deposited in the Treasury of the United States. (Secs. 995 and 996, Revised Statutes as amended; Comp. Stat., secs. 1644 and 1645; *In re moneys, etc.*, 170 Fed. 470, and *United States* v. *Abeel*, 174 U. S. 12, 20–21.)

It is no defense to say that the interest accruing on these funds does not belong to the United States. The requirement of the statute is not simply that clerks shall account for all moneys belonging to the Government, but that they shall also report and account for "all other amounts received for services in any way connected with the clerk's office" (act of June 28, 1902, *supra* p. 12), and "for any other moneys received by them in their official capacity, whether on behalf of the United States or otherwise" (act of June 30, 1906, 34 Stat. 754, Comp. Stat. sec. 1399). But apart from the question of the ownership of the funds and the interest arising thereon, and the duty of the clerk to account therefor, it is submitted that

the United States may maintain this suit as obligee on the clerk's bond.

The opposite contention overlooks the nature of the proceeding. It is not the purpose of this suit to establish, as between the litigants depositing the funds and the Government, the ownership of the interest arising thereon. This is a suit by the United States upon the official bond of the clerk, which provides that he "shall faithfully discharge the duties of his office . . . and properly account for all moneys coming into his hands as required by law." (Rec. 3.) It suffices for the maintenance of this suit to say, as in the declaration it is specifically alleged, that the interest in question "is and was no part of any sum or sums earned by him, the said Thomas C. MacMillan, as such clerk." (Rec. 4.) Compare *United States* v. *Davis*, 243 U. S. 570, 572.

It is not disputed that the principal on which the interest in question accrued was the property of the litigants depositing the same, nor could it be. *Howard* v. *United States*, 184 U. S. 676; *United States* v. *Abeel*, 174 Fed. 12. What reason, then, exists for saying that the interest is not also the property of the litigants? The case of *Rhea* v. *Brewster*, 130 Iowa 729, is directly in point. This was a suit wherein the clerk retained, as his own, interest on money intrusted to him in his official capacity. The court said:

> The money came into his hands by virtue of his office, and, though as a tender in a case,

became the property of the plaintiff upon the specific performance of the contract to purchase in accordance with the decree of the district court, affirmed by this court, and his title thereto related back to the time of such tender. That the clerk was liable for the money tendered is not questioned. . . . We think he is liable for any increase or increment thereon. Section 296 of the code provides what fees shall be collected by the clerk of the court, and section 297 fixes his compensation. That duties may be required of him for which no compensation is provided, does not authorize the allowance or exaction of additional compensation. . . . In undertaking to discharge the duties of the office he necessarily assumed, with the honors of the and emoluments, the burdens also. The money did not become the property of the clerk. It was merely deposited with him as custodian for the benefit of the party to the suit who might be adjudged entitled thereto. . . . (P. 731.)

The true test, as it seems to us, is not whether he is absolutely liable to account, but whether he is the owner of the funds in his hands. If he is not such owner, and the moneys coming into his hands belong to the county or some one else, any increment thereto is and should be treated as a part of the principal. This is the view approved in the better considered cases, and the only one consonant with sound public policy. (Citing *Board of Supervisors* v. *Wandel*, 6 Lans. (N. Y.) 33; *Eshelby* v. *Board of Education*, 66 Ohio

71; *State* v. *McFetridge*, 84 Wis. 473.) (Pp. 733–734.)

Since the clerk was not the owner of the interest, and since indisputably the same came into his hands in his official capacity as clerk, there can be no question as to the right of the United States to maintain this suit. In *Howard* v. *United States*, 184 U. S. 676, a clerk of court was sued on his official bond for an accounting of a sum of $2,525 deposited with him by a defendant in a civil case as a tender of money to a plaintiff. Mr. Justice Harlan in his opinion said:

> It must be taken as indisputable that the money in question was paid by Henry County in satisfaction of Stewart's claim or cause of action. It must also be taken as indisputable, upon this record, that the deposit was made with Watson as clerk in the presence and with the assent of the court, although no order was entered expressly requiring the money to be paid to the clerk, or expressly directing him to receive it. But all this is necessarily to be implied from the terms of the order of March 3, 1891, which states that Henry County—presumably in the presence of the court—*deposited the money with the clerk*. It would be a very narrow interpretation of the words of that order to hold that the money was paid to Watson without the knowledge, approval or sanction of the court, or that it was paid to him as an individual and not in his capacity as clerk. . . .
>
> He was allowed by statute a commission "for *receiving*, keeping and paying out money

in pursuance of any statute or order of court." Rev. Stat., sec. 828. It was well said by Judge Caldwell, delivering the unanimous judgment of the Circuit Court of Appeals, that *"for more than a century the clerks of the circuit courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and ordinary manner, and during that time neither the clerk nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such clerks."* (P. 682.) [Italics ours.]

The question of the liability of a clerk of a district court on his bond for moneys deposited by litigants as security for court costs in civil actions, and the right of the United States to maintain a suit for same, was determined in the case of *United States* v. *Abeel* (C. C. A. Fifth), 174 Fed. 12. The defense in that case, as set forth by the court in its opinion on page 18, was the same as in the case at bar, for the court says:

> The defense sustained by the court below is based on the proposition that the United States has no such interest in the fund as will sustain the suit.
>
> These sums were paid to Finks, not as an individual, but as clerk of the court. The parties who made the deposits were required to do so by rules of the court. Except as to the part of the sums necessary to pay his own costs, the clerk held the money officially, to be paid out to those entitled to it. His

possession of it never gave him any personal right to it, and he violated his official duty when he converted it to his own use. Holding the money as clerk, he held it subject to the orders of the court, and any witness or officer entitled to part of it, on motion and on proving the facts, could have obtained an order on the clerk to pay him the amount due him. If, when he ceased to be clerk, the deposits were in his custody, he had no right to longer hold them. If he could not immediately disburse the money to those entitled to it, he should have left it on deposit, subject to the order of the court, or turned it over to his successor in office. If it had been shown to the court that a retiring clerk had funds in his hands held by him officially, an order would have been made, if necessary, directing the fund to be turned over to his successor, or otherwise placed under the control of the court.

And the court continued (p. 19):

Unquestionably one entitled to a part of the funds in the hands of the clerk could sustain a suit on the clerk's bond in the name of the United States. *Howard* v. *United States*, *supra*. But it by no means follows that on the facts stated in the petition a suit for the breach can not be maintained by the United States without a statement that the suit is for the use of some one named in the petition. In *Boston & El. Ry. Co.* v. *Grace & Hyde Co. et al.*, 112 Fed. 279, 284, 50 C. C. A. 239, 244,

the court, referring to the phrase in a declaration, "for the use and benefit" of another, said:

"According to respectable authority, the expression of a use may be disregarded as surplusage. Its purpose is to guard the interest of the usee against the adverse action of a nominal plaintiff. It is held that such a phrase has no force to make an issue different from what it would have been if the phrase had been left out. It is held, also, that the declaration of use is no part of the pleading. *Bentley* v. *Insurance Co.*, 40 W. Va. 729, 739, 23 S. E. 584; *Belton* v. *Gibbin*, 12 N. J. Law, 77; *State* v. *Johnson*, 52 Ind. 197; *Clay Fire & Marine Ins. Co.* v. *Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346, 355; *Northrop* v. *McGee*, 20 Ill. App. 108; *Tedrick* v. *Wells*, 152 Ill. 214, 217, 38 N. E. 625; *Hobson* v. *McCambridge*, 130 Ill. 367, 375, 22 N. E. 823; 15 Enc. Pl. & Prac. 484, 498."

See, also, 31 Cyc. 100, and cases there cited, and *United States* v. *Griswold*, 8 Ariz. 453, 76 Pac. 596; Id., 9 Ariz. 304, 80 Pac. 317.

And generally as to the right to maintain a suit in the name of the plaintiff having the legal cause of action without mentioning the usee, see *Mobile & Montgomery R. Co.* v. *Jurey*, 111 U. S. 584, 593–595; *Webb* v. *Southern Ry. Co.*, 235 Fed. 578, 585–588; *Southern Ry. Co.* v. *Blunt & Ward*, 165 Fed. 258, 261; *Long* v. *Kansas City & Ry. Co.*, 170 Ala. 635, 642.

Indeed this proposition was expressly recognized by the district court in the present case. The court held, however, that since in its view of the case the

clerk was entitled to retain the interest, the principle had no application. The court said:

> Of course when a clerk has breached his obligation with respect to holding and properly disbursing moneys deposited by litigants, the power of the Government as obligee in the bond given by the clerk, to sue on behalf of and vindicate the litigant's rights, can not be denied. (Rec. 42; 209 Fed. 273).

As regards the suggestion in the opinion of the District Court that the clerk is an insurer of private funds deposited with him, and as such is entitled to retain as compensation the interest accruing thereon (Rec. p. 38), see *Rhea* v. *Brewster, supra; State* v. *McFetridge,* 84 Wis. 473; *Eshelby* v. *Board of Education,* 66 Ohio 71; *Garley* v. *People,* 28 Colo. 227 (Syl. 2); *Nash* v. *Faulkner,* 107 N. Y. 477.

CONCLUSION.

It is respectfully insisted that the judgment of the Circuit Court of Appeals was erroneous and should be reversed.

November, 1919.

ALEX. C. KING,
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O

Supreme Court, U. S.
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No. 167

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY,
Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

PAGE

Statement of the case..... 1

Brief and Argument—

I. Answer to Section I of plaintiff in error's argument..... 7

II. Answer to Section II of plaintiff in error's argument..... 11

III. Answer to Section III of plaintiff in error's argument..... 20

Conclusion..... 25

CASES REFERRED TO WITH REFERENCE TO PAGES WHERE CITED.

Bank of Arizona v. *Haverty*, 232 U. S., 106..... 8

Campbell v. *United States*, 224 U. S., 99..... 8

Gila Valley Ry. Co. v. *Hall*, 232 U. S., 94.....8, 25

Howard v. *United States*, 184 U. S., 676..... 22

Lewis v. *United States*, 244 U. S., 134..... 10

Luria v. *United States*, 231 U. S., 89.....8, 25

Magruder v. *Drury*, 235 U. S., 106..... 9

United States v. *Abeel*, 174 Fed., 12..... 22

United States v. *Davis*, 243 U. S., 570..... 23

United States v. *Hill*, 120 U. S., 169.....15, 19

United States v. *MacMillan*, 209 Fed., 266.....
.....2, 12, 13, 14, 20, 21, 22

United States v. *Mason*, 218 U. S., 517.....10, 23, 24

West v. *Rutledge Timber Co.*, 244 U. S., 90.....9, 25

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 167.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY,
Defendants in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS IN AND FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Because the statement of the case contained in the brief of plaintiff in error appears to us to be inadequate, we beg to supplement that statement as follows:

In the District Court of the United States for the Eastern Division of the Northern District of Illinois, there were begun in 1911 nine suits, all being actions in debt against the clerks of the various federal courts and their bondsmen. Amended declarations were later filed in each case. To these amended declarations, pleas

were filed and the government filed general demurrers to the pleas. In 1913 the demurrers in all of the cases were argued together and one opinion was filed by Judge Geiger on November 8, 1913, overruling the demurrers and sustaining the pleas, and the United States, electing to stand by its demurrers, judgments were rendered in favor of the defendants in each of the nine cases. (See Judge Geiger's opinion, Rec., 34-42; reported in 209 Fed. Reporter, 266.)

The declarations in the nine cases were alike except as to the amounts claimed and the parties defendant in the different suits. The pleas in the nine cases were also alike except in the same particulars. The declaration in the case at bar alleged a breach of Clerk MacMillan's official bond, consisting of a failure to account and pay over to the United States three thousand eight hundred sixty-one dollars and five cents ($3,861.05) alleged to have been derived from payments made to MacMillan for and on account of interest on *public moneys* entrusted to him in his official capacity as clerk, to wit:

(a) Moneys paid to the clerk as fees under the Bankruptcy Laws of the United States; and

(b) Moneys paid to the clerk as his fees and compensation and as his emoluments as clerk under the various statutes of the United States; and

(c) Moneys deposited with the clerk by various litigants in said District Court under and by virtue of certain rules of said court.

The aggregate sum of interest moneys, default in whose payment to the government is so averred is further characterized as having been "paid to him (the clerk) for the use of the said moneys collected and held by him as clerk as aforesaid under the laws of the United States," etc., and "the same is and was no part

of any sum or sums earned by him * * * (the clerk) as such clerk, but was in fact and is the property of the United States." The plea interposed to this declaration set up:

That there came into the possession and custody of the defendant clerk, and was deposited by him in various banks while he was in such custody and possession, certain moneys, referred to as the aggregate principal, composed of, and coming from various sources, viz.:

(a) Moneys paid to the clerk as clerk's fees and compensation, under the bankruptcy laws of the United States; and

(b) Moneys paid to the clerk as his fees, and compensation, and as his emoluments as clerk, under various other statutes of the United States; and

(c) Moneys deposited with the clerk by various litigants in said District Court, under and by virtue of certain rules of said court, hereinafter referred to.

That on the average balances of said "aggregate principal" so remaining from day to day on deposit, the clerk received interest at the rate of two (2) per cent, said interest so received being the said * * * (sum) mentioned in the declaration, and no other.

That as to the money included in items "a" and "b" and in that portion of item "c" which was, after its deposit, paid to the clerk as clerk's fees, emoluments or compensation as hereinafter mentioned (and which portion is hereinafter for convenience referred to as fund "d"), the clerk did on the first days of January and July of each year, or within thirty days thereafter, during all the time mentioned in the declaration, and in all respects as provided by statute, make a written return to the Attorney General of the United States, on a form prescribed by the latter, for and covering the next preceding semi-annual period, of all the fees and

emoluments of his said office as clerk of said District Court, and included in the same all of the moneys composing said items "a" and "b" and that portion of item "c" paid to the clerk as fund "d."

That each of said returns included also a statement of the necessary expenses of said office during the same respective semi-annual period, including necessary clerk hire (and including his own compensation as allowed by law) and was accompanied by vouchers, for, and showing the payment of the same; that each said return particularly stated the amounts for the respective preceding half year, of all fees and emoluments received, and of all said necessary expenses paid out, which expenses were deducted on said statement from the entire amount of all said fees and emoluments received; that the surplus money then remaining, and thus shown, was in each said half year period, and immediately after said return was made, to wit: on the same day, paid into the Treasury of the United States, or to the Subtreasurer of the United States, as was then directed by the Attorney General, and said surplus thus shown and accounted for and paid, was in each case received by the United States.

And the said interest received by the clerk in each semi-annual period earned and accrued as aforesaid upon said items "a" and "b," and upon that portion of item "c" above mentioned as fund "d" was so earned and accrued before, and not after, the said fees and emoluments composing the said items, had been so included in, and made the subject of said return, and had formed the basis of the computation and ascertainment of said surplus.

The plea further set out the court rules, which provide for the deposit by plaintiffs with the clerk, of the sum of twenty-five dollars, to be applied to the payment

of accruing costs; for the deposit by defendants appearing separately, of the sum of five dollars for the payment of defendants' costs that may accrue; for the receipt by the clerk of moneys paid to be applied on judgments, subject to the clerk's right to take one per cent thereof as earnings of the office; for the accounting of interest on such latter sums upon motion of a party—no such interest to be accounted for without the order of the court; for the repayment to original depositors of unexpended balances remaining in the clerk's hands after expiration of a specified time. The plea then averred:

That said item "c" was composed entirely of money paid to the clerk by litigants in said court, under and by virtue of said court rules above mentioned, and for the purpose of being disbursed by the clerk.

To himself as fees or compensation allowed by law; and to the marshal and other court officers as their respective fees or compensation allowed by law; and to other persons, and for other purposes, connected with litigation, as the same should be from time to time by said court directed.

That all of the fees and emoluments, earned by the clerk, and to which he became entitled, to be paid and which he was paid out of said item "c," were by him included in and specified in his said respective semi-annual returns and reports as aforesaid.

That that portion of the money composing said item "c" which was composed of said fees and compensation of the marshal, and other court officers, and said sums directed by the court to be paid to others, was all, by the clerk, paid to those court officers entitled to the same, as, and when the same was by such officer earned, or was paid to such other person when and as the court directed the same to be paid to them, as the case might

be, said portion being herein called and referred to as fund "e."

That the money composing the residue of said item "c," other than fund "d" and fund "e," was by the clerk paid out to the persons depositing the same, or to their successors entitled thereto, under and by virtue of said court rule, as and when the same was and became payable.

That of the said sum of money composing item "c" that portion earned by, and paid to, the clerk as fees and emoluments earned by him as clerk (being fund "d") was in each case included in, and settled for, in the respective semi-annual returns as aforesaid.

One of the nine cases (not the case at bar but differing from it only in the amount involved and the parties made defendant as sureties on the clerk's bond) was brought into the Circuit Court of Appeals for the Seventh Circuit on a writ of error by the United States and submitted to that court on printed briefs and oral argument at its April term, A. D. 1917, and was there numbered and known as Case No. 2180. Pending the consideration of that case by the Court of Appeals, the case at bar was brought into the Court of Appeals on writ of error by the United States and there numbered and known as Case No. 2181. At its October term, A. D. 1917, the Court of Appeals handed down an opinion in Case No. 2180 affirming the judgment of the District Court. (Rec., 33 and 34.)

Afterward at the April term, A. D. 1918, of the Circuit Court of Appeals, the case at bar was submitted in that court on printed briefs and oral argument and that court then affirmed the judgment of the District Court on the authority of its opinion in Case No. 2180 (Rec., 24) and it is from this last judgment of affirmance that this writ of error is prosecuted.

BRIEF OF ARGUMENT.

I.

The plaintiff in error now raises the point that the status of the clerk of the District Court for the Northern District of Illinois during the time involved in this suit was different from that of the clerks of the other United States courts, in that the clerk of the District Court for the Northern District of Illinois was a salaried officer of the United States deriving no part of his compensation from the earnings of his office and was not authorized by law to retain out of the fees and emoluments of his office, in addition to necessary office expenses, clerk hire, etc., his own compensation as allowed by law and account to the Attorney General for the balance remaining only.

The plaintiff in error is not in position to raise this point at this time. The pleas of Clerk MacMillan in this case, as well as the first case taken to the Court of Ap-

peals and there known as No. 2180, in referring to his semi-annual return to the Attorney General, averred

> "That each of said returns included also a statement of the necessary expenses of said office during the same semi-annual period, including necessary clerk hire (and including his own compensation as allowed by law) and was accompanied by vouchers for and showing the payment of the same."

General demurrers were filed by the United States to these pleas. Upon argument of these demurrers before the District Court no point was raised by the United States that the status of this clerk was different from the status of clerks of the other United States courts nor was it contended that this clerk did not have a right to and did not actually retain out of the fees and emoluments of his office his own compensation as well as clerk hire, office expenses, etc., and account to the Attorney General for the balance remaining only, but the cases were argued and submitted in the District Court absolutely and solely upon the theory of facts alleged in the plea.

We submit that the plaintiff in error, having failed to raise this point in the District Court when the nine cases were there argued, submitted and considered, is not in position and should not be allowed to do so now. See *Campbell* v. *U. S.*, 224 U. S., 99, 106; *Luria* v. *U. S.*, 231 U. S., 9, 17; *Gila Valley Railway Company* v. *Hall*, 232 U. S., 94, 98, 99; *Bank of Arizona* v. *Haverty*,

232 U. S., 106, 110; *Magruder* v. *Drury*, 235 U. S., 106, 113; *West* v. *Rutledge Timber Company*, 244 U. S., 90, 100.

Aside from the foregoing considerations, however, the question whether the clerk was a salaried officer and received his compensation direct from the government or whether he retained his compensation from the fees and emoluments of his office would have no bearing upon the legal principle governing this case. In either case the clerk is required to make his semi-annual return on the first days of January and July of each year to the Attorney General. The fact that a clerk may be salaried does not require that deposits made with him for costs shall be by him paid into the Treasury prior to such semi-annual return and audit. In other words, his relation to such deposits would be precisely the same in either case. If he was a salaried officer and received his compensation from the government during the time, as now contended by the plaintiff in error, he still is authorized and required by law to pay his office expenses and necessary clerk hire out of the fees and emoluments of his office and to account for the balance remaining on hand at the end of the six-month period only. Before such accounting he would be directly and personally interested in these fees and emoluments up to an amount which would reimburse him for his clerk hire and office expenses, since if that amount were not received the deficit would become a personal charge upon him.

It is obvious, therefore, that even though the clerk may not during the time covered by this suit, have retained his compensation from the fees and emoluments of his office (which is contrary to the government's admission of record and a point it cannot now raise) still

that is not controlling upon the real question involved in this case. The question involved in this case is whether the funds received by the clerk were *public moneys* of the United States before a surplus of moneys in his hands as clerk was ascertained and required to be paid over by his account and return. This court has already held that before such accounting is made and before such surplus is established, the government has no interest whatever in the money in the clerk's hands—*U. S.* v. *Mason*, 218 U. S., 517. This case, it seems to us, is decisive of the case at bar. The District Court for the Northern District of Illinois, in deciding the case at bar followed the Mason case and held that the ruling in the Mason case was conclusive in the case at bar. (Rec., 39.)

In the case of *Lewis* v. *U. S.*, 244 U. S., 134, cited by plaintiff in error in its brief, the controversy arose over certain fees paid to the incumbent of the office of Surveyor General for copies of plats of survey and transcripts of records of said office, the fees to be charged therefor having been previously fixed by the same Act of Congress which fixed the Surveyor General's salary at $2,000 per annum. In that case the United States contended that allowance to the claimant of these fees (being moneys paid into that office for copies of plats of survey and transcripts of records) was prohibited by Section 1765 of the Revised Statutes of the United States.

The claimant contended that Section 1765 of the Revised Statutes did not interfere with collection of these fees, because Section 1765 only prohibited compensation additional to "salary, pay or emoluments * * * fixed by law or regulations" and that under a previous statute these fees were emoluments already fixed by law.

This court held that Section 1765 of the Revised Statutes

prevented the allowance of the claim for the fees. We fail to see wherein that case is in point here, the fees in that case being clearly *public moneys,* as distinguished from fees of a clerk's office held by this court in the Mason case not to be *public* moneys until *after accounting* and *surplus established.*

Furthermore, it does not appear from that case or the Acts of Congress therein cited that the Surveyor General is, or was authorized and required to pay out of the fees which were the subject of controversy, necessary clerk hire, office expenses, etc., and account for balance only as clerks of the United States courts are. It clearly appears, therefore, that the Lewis case is of no binding force as an authority on the proposition involved in the case at bar. The declaration in this suit was bottomed on the flat premise that the moneys, at the time they reached the clerk's hands and upon which the interest was earned, were *public moneys;* that is, they belonged to the public at the time they earned the interest.

If the proposition is established as a fundamental fact that the money before accounting is public money, then, of course, the interest follows the principal and the government is entitled to it, but in this case the exact reverse is true and was so held by this court in the Mason case.

II.

Under this section of its brief the United States contends that the interest collected by the clerk was an emolument of his office and that he should account for the same. In answer to this contention we quote from Judge Geiger's opinion as follows:

"This language, it seems to me, leaves nothing

further to be considered except the suggestion made by plaintiff that the interest moneys, being received upon funds which came to and were in the clerk's hands by virtue of his office, should be considered and accounted for as *emoluments*. What test is afforded in determining whether a sum of money received by an official is an emolument of his office? Certainly this—that the official do some act or perform some service pursuant to the obligation or sanction of his office to or for the benefit of the one paying the money charged to be an emolument; that the one paying the money has the right to exact from the official the rendition of the service, and the official has the right to exact the money return—under official obligation or sanction of the particular office to which the emolument is claimed to attach. To put it in another way—the payment moves to the official in consideration of the rendition by him of some official act or service, the official does the act or renders the service by virtue of his office. The official character of the act is his warrant for exacting the payment.

Now, while it is true that the incumbency of the office of clerk by an individual, his receipt of moneys for fees, emoluments or deposits by litigants, and the deposit thereof by the clerk in banks, all concur in furnishing or creating the occasion through which he receives interest on the funds in the bank, yet he is not required, therefore cannot and does not deposit the funds in the bank upon an interest paying basis by virtue of his official obligation; nor can or does he exact the interest from the banks under the sanction of official right or duty. *Therefore such interest is not and cannot be an emolument.*

In this connection it is further urged by the Government that, until the semi-annual return is made, the moneys received by the clerk for fees, court costs, etc., belong 'to the office of the clerk and not his individual property.' It is not possible that the 'office' of clerk can be treated as an entity, apart from the Government or the clerk, having a proprietary interest or title in or to the funds. If

the contention be that because the moneys are paid to and received by the clerk by virtue of his office and not individually, therefore they are not his individual property, the reply is aptly stated by Mr. Justice Hughes in the Mason case:

'There has thus been established a distinct system with respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. The consideration however does not aid the prosecution for they were attached to the office before the Statute of 1841, when they belonged to the clerk without any duty to account for them.'

This last observation suggests the query if, prior to the passage of these statutes, the clerk had deposited in the bank all moneys received by him as clerk and had received interest on his daily credit balance, could it reasonably be claimed that such interest money was an emolument of his office? It is my judgment that whatever effect these various statutes may have, they do not have the effect of transforming into fees and emoluments, payments which, prior to their passage, were not fees and emoluments received for the discharge of official duties. They furnish no new tests for determining the character of funds received by the clerk. Nothing demonstrates this more clearly than *United States* v. *Hill, supra,* and the amendment to the statute which ensued the rendition of that decision. There, a clerk of the district court by direction of the judge, rendered services by way of assistance in naturalization proceedings—the preparation of cases for hearing, examination of witnesses and the like, for which he collected compensation from the applicants. It was sought to compel him to account for the moneys thus received; but as the duties were held not to pertain to the office of clerk, he was held not obliged to include them in his return. The law as subsequently enacted by Congress declared such compensation subject to be accounted for as other

fees and emoluments—doubtless to avoid the effect of the ruling referred to.

The conclusion to be drawn from the Mason case would therefore appear to be: That the statutes which have been passed since 1841 do not abolish, but on the contrary were and are intended fully to recognize and continue in force the pre-existing system of compensating clerks of courts by means of fees and emoluments collected from persons who as litigants or otherwise are recipients of their official services; that the fundamental purpose of these statutes is (1) to place a limitation upon the aggregate amount of compensation which may be received by clerks through such system; (2) to impose upon the clerks the obligation to pay to the Governments—of which they are officials—the excess beyond such limitation; (3) to provide the manner and means, semi-annually, of reducing such obligation to concrete terms, by requiring returns, accounting and the like, and (4) the manner and means of securing performance by the clerks of the statutory obligation to pay the excess, if and when ascertained. This conclusion, and no other, is reconcilable with the Supreme Court's view that the clerk is not a trustee but a debtor, of the Government." (Rec., 40, 41 and 42.)

The Circuit Court of Appeals, in affirming Judge Geiger must necessarily have approved this reasoning. (See Opinion C. C. A., Rec., 33 and 34.) The Comptroller of the Treasury has also held that interest moneys received by the clerk are not emoluments, in Volume 23, page 732, June 13, 1917.

The reasoning of Judge Geiger is so sound and so conclusive that reference to, or attempt to distinguish the decisions of, state courts cited by the plaintiff in error is unnecessary, and this is particularly so when the history with reference to the compensation and fees of clerks of the United States courts is taken into consideration as was done by Judge Geiger in his exhaustive opinion.

The language of the statute is that the clerk shall ac-

count for "all fees and emoluments of his office of every name and character." A *fee* is allowed to the clerk by a statute, for services performed. An *emolument* has been defined and fixed as to its outlines by the Supreme Court.

United States v. *Hill,* 120 U. S., 169.

This case has been subsequently cited, with approval, by the courts. In the Hill case the question involved was whether the clerk should include in his semi-annual return, as an emolument, the money he received to compensate him for services rendered to individuals in naturalizing them.

The service was rendered to individuals, not as clerk, but because the individual who was clerk was specially designated by the court to perform the particular service, and was, in the same way, permitted to collect the compensation for such service.

The Supreme Court quoted, with approval, and adopted as its own, the opinion of the lower court, which was in part as follows:

> "In respect to naturalization cases, it has never been hitherto understood, either by the judges or the departments, that the fees of the clerk were for services rendered in his official capacity. At times, especially before elections, these applications are extremely numerous. The papers are usually prepared by the parties themselves or their friends, or more frequently by agents of candidates. The hearings are *ex parte,* at no stated times, and it is rare that any person appears in opposition. It has, therefore, been necessary, both in the interest of the applicants, and for the due and orderly execution of the law, and to enable the court to dispose of the cases, that the paper should be looked over and corrected by some person familiar with the law and practice, and in many instances that the witnesses should be examined before the cases were presented to the

court for final action. It was for this service that the clerk has been allowed to make these charges to the parties. These are duties which the court has the undoubted right to have performed by some other persons than the presiding judge. In these cases the clerk acts rather as a person appointed to assist the court in exercising its functions, like a master or examiner in an equity cause, or an assessor in admiralty, or an auditor in a suit at law. It is the universal practice of all courts of large jurisdiction to appoint special officers, at the expense of the parties, to make inquiries, investigate details, examine papers, take accounts, make computations, and perform ministerial acts. Their reports, when returned into court and accepted, become part of the case, and form the basis of the orders and decrees of the court in the cause. • • •

It is for *services rendered* under these rules, and as a special officer of the court, and not as clerk, that these fees have been permitted. *They were not duties pertaining to the office of clerk. They could as well have been performed by any other person designated by the court for the purpose; as by the district attorney, or a commissioner of the Circuit Court, or an attorney, or any suitable person not an officer of the court.*" (Italics ours.)

Afterwards, and because of this opinion, the *statute* was so amended as to specifically make the naturalization money an *emolument*—a fact which recognizes and emphasizes the accuracy of the above definition.

Applying this definition to the case here at bar, we observe that interest collected by the clerk, on litigants' money held by him on deposit, while it still remains litigants' money, and is not yet earned as fees by the clerk, or otherwise disbursed, does not fall within the definition of *emolument*, because:

(1) It is not paid to the clerk to compensate him for *service* rendered by him;

(2) If the mere depositing of this money in the bank can be said to be "*performing a service,*" and if the re-

sulting interest can be said to be "a compensation for that service," even when that service is not rendered for the compensation earned, *by the reason of his official capacity, as clerk.* Any one could perform the service, if the court designated him to do it. Mr. MacMillan could do this thing as well if he were out of office, as if in office. It is a special duty enjoined on him by the court, and no part of his official capacity; and no part of the duty of his office.

The *Hill case* seems absolutely conclusive of this question.

Originally, the clerk received fees and emoluments as his own property, and kept them all, accounting to no one. Subsequently, it was provided that of such fees and emoluments received, he should, at the end of each six months' period, render an account to the United States concerning them; that he should deduct from the total the cost of his clerk hire, office expenses, and his own fixed amount, and that the *surplus* should be paid over to the United States.

The statute which made this limitation did not change the original status and ownership of the money. Before the statute the money was that of the clerk. The statute allowed him to collect it from the litigant, if necessary, by process of law, in his own name. The statute did not change this legal status. The money remained, notwithstanding the statute, the money of the clerk in the first instance. It might *always* remain the money of the clerk. In many districts it always does remain the money of the clerk. The statute merely provided that, of the aggregate fees and emoluments received, he should pay over the surplus. When this surplus is ascertained, then the United States, for the first time, acquires some right in the surplus. Exactly what that right is, is not material

here, *but before* this surplus is ascertained the United States has no interest, whatever, in the fund. Up to that time the money is the clerk's own money. It is not *public funds.*

In the language of Justice Hughes, in the *Mason case,* 218 U. S., 531, "the amount with which the clerk is chargeable upon his accounting is not '*public money*' or '*the money or property of the United States.*' • • • The fees and emoluments *are not received* by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties." (Italics ours.)

Under this clear statement of the status of this money, the United States can claim no possible ownership in them, or in any increment earned on them *before the accounting.*

The opinion in the Mason case continues, "and with respect to the amount payable when the return is made the clerk *is not trustee, but debtor.*"

However, this last question is not before the court in this case.

And finally, the facts on the pleadings here show, that for many years, the clerk has not accounted for this interest, and has not considered the same as an emolument of his office, or as increment earned on public money. But, on the contrary, has, with the full knowledge of the court, of the treasury office, and of everyone concerned, made his returns, *exclusive* of this interest. There is no question of bad faith involved, but only the construction of a statute which has been the subject of administrative action every six months for many years.

For many years the department officers, and all concerned, have acquiesced in this practice, and thereby

placed their implied construction on this statute. We, therefore, invoke in favor of the defendants, the rule laid down in

United States v. *Hill,* 120 U. S., 169, 182,

in which the court said:

> "With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right to rely on that interpretation in giving the bond; and the semi-annual accounts of the principal having been actually examined and adjusted at the treasury, with the naturalization fees excluded, down to and including the one last rendered five months before this suit was brought, a court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction. This principle has been applied, as a wholesome one, for the establishment of justice, in many cases in this court, not only between man and man, but between the Government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive and administrative.
>
> In *Edwards' Lessee* v. *Darby,* 12 Wheat., 206, 210, it was said: 'In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.' To the same effect are *United States* v. *Dickson,* 15 Pet., 141, 145; *United States* v. *Gilmore,* 8 Wall., 330; *Smythe* v. *Fiske,* 23 Wall., 374, 382; *United States* v. *Moore,* 95 U. S., 760, 763; *United States* v. *Pugh,* 99 U. S., 265, 269; *Hahn* v. *United States,* 107 U. S., 402, 406; and *Five Per Cent Cases,* 110 U. S., 471, 485. In the

case of *Brown* v. *United States*, 113 U. S., 568, the same doctrine was applied, the cases in this court on the subject being collected, and it being said that a 'contemporaneous and uniform interpretation' by executive officers charged with the duty of acting under a statute 'is entitled to weight' in its construction, 'and in a case of doubt ought to turn the scale.' A still more recent case on the subject is *United States* v. *Philbrick*, *ante*, 52, where this language is used: 'A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned.' "

We submit that on this principle alone the contention of defendants in error should prevail.

III.

The basis of the Government's contention under this head is that the United States as obligee in the clerk's bond can maintain a suit against the clerk's surety for failure to account for interest collected and retained on moneys deposited by litigants subject to litigation. Such a contention must necessarily rest upon the theory that such moneys are for the time being public moneys. This contention must fail because this court has held in the Mason case, *supra*, that such moneys are not public moneys before the accounting. As to this contention of the Government, we again quote from Judge Geiger's opinion as follows:

"It will be assumed that the plaintiff seeks recovery of the interest money in its own right; that the failure to account for and pay it to the Government, is assigned as a breach by the respective clerks of an official obligation to be discharged by them to the plaintiff; that while, as seen from the statement of facts, the defendant clerks have assumed obligations toward litigants respecting the disbursement of

deposited moneys and the return to such litigants of any unexpended portion, no breach of any such obligation is assigned as a basis for institution of suit by the Government on behalf of others; in other words, the plaintiff seeks recovery of the interest moneys 'as the property of the United States.' So too, it will be assumed that if the revenues coming to the hands of the clerks are in truth public moneys, the property of the Government, then any interest earned thereon, no matter when or how, rightfully follows the principal or corpus, as an incident or increment, in no event subject to personal appropriation by the custodian of the principal.

Considering first the interest money as arising upon a fund in part constituted from deposits made by litigants to be drawn against by the clerk for payment of fees as they accrue, certainly neither the clerk nor the Government has any interest in such deposits, prior to proper appropriation for the uses intended, except to hold them. Even admitting for the time being, that the fees when actually earned and paid are then public funds, the deposit made by a litigant to secure such payment, is in no proper sense a fund in or over which the Government has obtained the slightest proprietary interest or power of disposition. That interest and right is retained by the litigant, save only as he has surrendered it to the clerk to exercise by drawing against it in the defrayal of fees as and when, under the law, they accrue and are chargeable against the litigant. While the transaction in making the deposit under the rule may not technically be a bailment, the clerk, in the nature of things, stands as a sort of insurer for the return to the litigant of the deposit or such part thereof as shall not have been earned as fees either by himself or others for whose benefit it is made. Certainly the deposit is not made for the benefit of the Government. The clerk under the law is required to account for fees earned whether they are paid or not; and the rule does not impress such deposit with the character of public moneys or revenues; but is a mere regulation for the protection of the clerk, to guaranty to him in advance, and as an administrative convenience in the discharge of his

duties of and in the payment of moneys primarily receivable by him as his compensation. As indicated, if these court rules for deposits were not in force, it would rest with the clerk to insist upon payment of each fee as it is earned, in advance. If he failed to collect, but accounted for it as earned, the loss is his. His failure actually to collect the money from the litigant, while it might so result in loss to him, would not, if he accounted for it to the Government, be a breach of any condition of his bond. So long, therefore, as the moneys deposited by the litigant retain their status as a security deposit, the Government has and can have no claim to any increment thereof by way of interest." (Rec., 38 and 39.)

In *Howard* v. *United States,* 184 U. S., 676, cited by plaintiff in error, the money was paid to the clerk in a pending litigation and belonged to the court as a part of the subject of litigation. It was held that the money could be recovered by the United States as obligee for the owner but only after demand by the owner and default by the clerk. It was not held that the money was public money or that the United States had any proprietary interest in it.

In *U. S.* v. *Abeel,* 174 Fed., 12, on which the Government places reliance, it was decided only that where the clerk embezzled litigants' funds, the *United States, as obligee* in bond and to prevent multiplicity of suits might bring suit on the clerk's bond to recover these moneys *for those who owned it.* This was a mere matter of procedure, practice and pleading and did not in any way intimate that the United States had any title or interest in the money.

In the Abeel case the clerk had failed to pay on demand and was in default. He might, therefore, be sued either by the individuals or by the United States for the individuals, but neither of them could sue him *unless* he was in default.

In *U. S.* v. *Davis,* 243 U. S., 570, 572, cited by the Government in its brief, an indictment consisting of nine counts was returned against Davis for converting moneys of persons other than the United States to his own use. The sixth count alleged that Davis was clerk of the United States District Court for the District of Hawaii. The remaining counts described him as deputy clerk of the District Court in the aforesaid district. The clerk of the District Court of the United States for the District of Hawaii was, during the time covered by the indictment, a salaried officer under a special act of Congress and his salary was appropriated and paid to him by the Government and he was not entitled to retain the same out of the fees of his office.

Justice Morrow of the Circuit Court of Appeals for the Ninth Circuit, who presided in the United States District Court for the District of Hawaii at the trial of the case, sustained a demurrer to all of the counts of the indictment. His decision, apparently, being based on the authority of *U. S.* v. *Mason,* 218 U. S., 517, the Government removed the case to this court on writ of error and among other things assigned as error that the lower court erred in holding that the principles of the "Mason" case (*U. S.* v. *Mason,* 218 U. S., 517) applied to a deputy clerk as well as to a clerk and in its brief filed in the Supreme Court expressly asked that the judgment of the lower court be affirmed as to the sixth count and reversed as to the other eight counts.

It will be noticed that this court, in reversing the judgment, confined its decision strictly to the point raised by the assignment of error. Inferentially, at least, the decision of the Supreme Court in the Davis case supports the holding of the District Court and the Court of Appeals and the contention of the defendants in error in this case, and is, we submit, an authority in favor of the

defendants in error in this case in view of the point now raised by the United States that Clerk MacMillan is a salaried officer.

The clerk of the United States District Court for the District of Hawaii was a salaried officer, but in the Davis case the Government did not contend that the Mason case, *supra*, did not apply to the sixth count of the indictment (that being the count wherein Davis was charged as clerk) and this court in its decision did not so hold. Instead of that case being an authority in favor of the plaintiff in error, we think it recognizes that the principles held in the Mason case did apply to the count where Davis was described as *clerk*, and only holds that the principles of the Mason case did not apply to the remaining counts describing him as deputy clerk.

Not one of the cases cited in the brief of plaintiff in error holds or even intimates that the disputed funds prior to accounting and prior to the establishment of a surplus were public money or that the United States has any proprietary interest in such moneys. It is, of course, true that where the money at bar is in fact public money by United States statute, then the interest follows the corpus belonging to the owner—the public—but that is not the case. Here the money by express and direct decision of the highest tribunal is not public money; hence, the many cited cases, where in each case, the money was by state statute or state judicial decision public money, have no application to the case at bar.

If the clerk embezzled or converted for his own use by failing to disburse as required by law, the funds handed him by litigants, then without doubt the United States, as obligee and only as obligee, could sue the bondsmen for such converted money, but the suit would not be for the benefit of the United States as owner or because the

United States has any interest in the money, but merely because it was obligee in bond and therefore nominal plaintiff for the benefit of the true owner. The owner of the money could not sue the clerk on his bond for *interest* on his deposited money, neither could the United States. The clerk has not contracted to pay the litigant interest and a *debtor* becomes liable for interest only by express contract or by implied contract arising from an account stated and a failure to pay the stated amount. If the owner cannot sue the clerk to recover interest on the money deposited by such litigant owner, then obviously the United States, acting merely as obligee on the bond and *wholly for the use of the owner* can have no larger right in behalf of the owner than the owner has for himself.

In the note at the bottom of page 18 of the Government's brief a suggestion is made that the plea does not answer the entire declaration. It is sufficient answer to this to say that no point of this kind was made in the court below. The Government cannot raise it now. (See *Luria* v. *U. S.*, 231 U. S., 9, 17; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S., 94, 98, 99; *West* v. *Timber Co.*, 244 U. S., 90, 100.) There is no merit in the suggestion, however, as the plea fully answered the entire declaration.

Conclusion.

The argument of the defendants in error is, therefore, summarized thus:

1. That even if all the money in question is *public money* in the hands of the clerk, for disbursement, yet the Government, before accounting and default, could not maintain action *for interest* on the fund.

2. That as to the money deposited by litigants, and

not yet disbursed, the same is, and always remains individual money. That as to this money the clerk is debtor to the litigant who deposited it. That neither such litigant nor the United States, acting for him, as obligee on the bond, could maintain an action for interest, except where the clerk had defaulted in making account for the funds when demanded.

3. That it cannot be claimed that the increment, or interest earned on litigants' individual money, not yet disbursed, is an *emolument* because it is not earned by the clerk, either as compensation or in his official capacity, as clerk.

4. That as to the money earned by the clerk as fees and emoluments, and *before* a surplus is ascertained and paid, the same is the money of the clerk, and not the property or money of the United States, and concerning it the Government has no right, title or interest.

5. That the long practice in respect to this interest matter amounts to an administrative interpretation of the statute and as against the clerks and their bondsmen, who are entirely innocent of wrongdoing, should not be reopened to their detriment.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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THE case is stated in the opinion.

The Solicitor General and *Mr. A. F. Myers* for the United States:

The clerk of the District Court for the Northern District of Illinois during the period involved was a salaried officer, expressly prohibited from receiving any additional pay, allowance, or compensation. Act of July 31, 1894, 28 Stat. 204. As such he was clearly subject to the provisions of Rev. Stats., § 1765. *Hoyt* v. *United States*, 10 How. 108; *Lewis* v. *United States*, 244 U. S. 134; *United States* v. *King*, 147 U. S. 676.

The moneys included in defendant's semi-annual returns, on which interest was collected and retained, were received in his official capacity. He thereupon became obligated to account for all such fees and emoluments over and above the necessary expenses of his office. The interest followed the principal, of which the United States was the sole owner, after deduction of the necessary expenses. *United States* v. *McMillan*, 165 U. S. 504; *United States* v. *Abeel*, 174 Fed. Rep. 12; *United States* v. *Mason*, 211 Fed. Rep. 233; 219 Fed. Rep. 547; *Alexander* v. *United States*, 43 Ct. Clms. 389, 395. The ground of decision in *United States* v. *Hill*, 120 U. S. 169, was that since various clerks, with the acquiescence of the judges and of the executive branch of the government, had uniformly omitted from their returns fees received in naturalization cases, such long standing practice amounted to a contemporaneous construction of the statute requiring such returns. The statute was amended by expressly providing that the word "emolument" shall include such fees. Act of June 28, 1902, 32 Stat. 475. In *United States* v. *Mason*, 218 U. S. 517, the court was careful to observe (p. 530) that the case was not one where a clerk has refused or failed to make the return required by statute or to pay over the surplus shown by his return

to exist. While there is no federal decision holding interest on the principal to be an emolument, the term would seem to be broad enough to include it, particularly in view of the statutory definition in the Act of 1902, *supra*. The opinion of the Comptroller (23 Comp. Dec. 732) cited by the court below, was based upon the opinion of the District Court in the present case, and is not an independent opinion. In *Vansant* v. *State*, 96 Maryland, 110, it was expressly held that a clerk should account for interest on moneys deposited by him as emoluments. To like effect are: *Hughes* v. *People*, 82 Illinois, 78; *Hunt* v. *State*, 124 Indiana, 306; *Rhea* v. *Brewster*, 130 Iowa, 729.

The United States, as obligee of the clerk's bond, may maintain a suit against the clerk and his surety for failure to account for interest collected and retained on moneys deposited by litigants subject to disbursement. The moneys continued to be the property of the litigants in the possession of the clerk until they were used for the payment of court costs, or were subsequently returned. If these deposits remain unclaimed by the persons entitled thereto for five years they become subject to an order of court to cause them to be deposited in the Treasury of the United States. Rev. Stats., §§ 995, 996, as amended; *In re Moneys*, 170 Fed. Rep. 470; *United States* v. *Abeel*, 174 U. S. 12. It is immaterial that the interest accruing on these funds does not belong to the United States. The requirement of the statute is not simply that clerks shall account for all moneys belonging to the Government, but that they shall also account for "all other amounts received for services in any way connected with the clerk's office," Act of 1902, *supra*, and "for any other moneys received by them in their official capacity, whether on behalf of the United States or otherwise." Act of June 30, 1906, 34 Stat. 754. This is not a suit to establish, as between the depositors and the United States, the ownership of the interest, but a suit on the

UNITED STATES *v.* MACMILLAN ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 167. Submitted January 23, 1920.—Decided June 1, 1920.

The exceptional legislation under which the salary of the clerk of the District Court for the Northern District of Illinois was for a time appropriated for by Congress, leaving, however, the expenses of his office to be defrayed as in other cases out of the fees and emoluments did not operate to convert such fees and emoluments when collected into public moneys of the United States. P. 201.

Moneys received by a clerk of a District Court as interest upon average daily balances of bank deposits made up of fees and emoluments earned by the clerk, or made of moneys deposited with him by litigants to meet future costs, etc., under rule of court, are not public moneys of the United States, nor emoluments for which he must account to the Government. Pp. 201 *et seq.*, 204.

251 Fed. Rep. 55, affirmed.

official bond of the clerk which requires him to account for all moneys coming into his hands as required by law. It is therefore sufficient to allege that the interest is and was no part of any sum earned by the clerk. *Cf. United States* v. *Davis*, 243 U. S. 570. Since the clerk was not the owner of the interest, *Rhea* v. *Brewster*, 130 Iowa, 729, and since it came into his hands in his official capacity, the United States could maintain this suit, *Howard* v. *United States*, 184 U. S. 676; *United States* v. *Abeel*, 174 Fed. Rep. 12; without mentioning the beneficiaries. *Mobile & Montgomery R. R. Co.* v. *Jurey*, 111 U. S. 584, 593; *Webb* v. *Southern Ry. Co.*, 235 Fed. Rep. 578, 585; *Southern Ry. Co.* v. *Blunt*, 165 Fed. Rep. 258, 261; *Long* v. *Kansas City &c. Ry. Co.*, 170 Alabama, 635, 642.

As to the District Court's suggestion that the clerk as insurer of private funds deposited with him is entitled to retain the interest as compensation, see *Rhea* v. *Brewster*, *supra*; *State* v. *McFetridge*, 84 Wisconsin, 473; *Eshelby* v. *Board of Education*, 66 Ohio St. 71; *Garley* v. *People*, 28 Colorado, 227; *Nash* v. *Faulkner*, 107 N. Y. 477.

Mr. George T. Buckingham, *Mr. Marquis Eaton* and *Mr. Charles Troup* for defendants in error.

Mr. Chief Justice White delivered the opinion of the court.

The relation of the United States to moneys alleged to have been collected by a clerk of a district court of the United States as fees or emoluments of his office and the scope of his duty to account semi-annually for the same to the Attorney General so as to fix, if any there was, the surplus due to the United States after paying the expenses of the clerk's office and the clerk's salary as fixed by law, is the general subject here arising for consideration. § 833, Rev. Stats.; Act of June 28, 1902, 32 Stat. 475, 476; § 839, Rev. Stats.; § 844, Rev. Stats.

195. Opinion of the Court.

The controversy originated by a suit commenced by the United States against the defendant in error as clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, and the surety on his official bond to recover $3,861.05. The right to the relief was based upon averments that during the period from December 27, 1905, to January 27, 1910, the clerk had collected the sum named as interest on the average daily balances of his bank accounts resulting from the deposit by him of the fees and emoluments of his office and of moneys placed by litigants with him to meet payments for costs or otherwise which they might lawfully be required to make during the course of the litigation.

It was further alleged that although the interest thus received constituted a fee or emolument of the office of the clerk, or money held in trust by him for the United States, for the receipt of which he was bound by law semi-annually to account, he had failed to do so and was therefore liable.

By plea the defendants admitted the collection by the clerk of the amount sued for as interest on the average daily balances of his bank accounts made up as alleged of moneys derived from fees and emoluments and deposits by litigants under the rules or orders of court. The plea averred that, as required by law, the clerk had made his semi-annual accountings in which, although he did not charge himself with the interest allowed him on his bank balances as stated, he had charged himself with every item constituting a fee or emolument of his office from whatever source due, and after debiting the charge thus made with the proper proportion of his salary and the expenses of his office, had turned the balance, if any there was, into the Treasury of the United States. There was annexed to the plea a copy of the rules of court relating to the placing by litigants of money with the clerk, and the plea alleged that whenever, out of such money, any

charge whether for a fee or emolument or otherwise became due, it was at once paid, so that the amount of that deposit always solely represented money belonging to and held for the account of the depositing litigant to meet payments due by him which might thereafter arise.

To this plea the United States demurred as stating no defense and, after hearing, its demurrer was overruled. In consequence of an election by the United States to plead no further, the case was submitted for judgment on the petition and plea.

At that time the court had under advisement eight other cases involving the questions arising in this, five being suits by the United States against the clerks of other United States courts and three, in addition to this, being against the clerk who is defendant here, covering interest collected for different periods. The court disposed of the nine cases in one opinion. It held that as there was no contention as to a default by the clerk concerning any money deposited with him by litigants, that subject would be put out of view. Carefully considering the pleadings, it held that the claim of the United States to the interest rested upon one or the other of two propositions: (1) that the money deposited by the clerk and upon which the interest was allowed was public moneys of the United States and therefore the interest belonged to the United States; (2) that without reference to whether the deposits were public moneys, the interest paid was an emolument for which the clerk was bound to account. Elaborately considering these questions the court decided both against the United States.

Reviewing on error one of the cases against this defendant which was decided, as we have seen, by the trial court along with this, the Circuit Court of Appeals affirmed the trial court in a brief *per curiam* opinion in which it approved the analysis of the case as made by the trial court and concurred in holding decisive the cases in this

court which the trial court relied upon. Subsequently when the case now before us came to be heard the ruling in the case just stated was applied to this and the judgment was therefore also affirmed.

In argument here it is suggested by the United States that as the defendant clerk was by exceptional legislation an officer whose salary was specifically appropriated for (Acts of July 31, 1894, 28 Stat. 162, 204; March 2, 1895, 28 Stat. 764, 806; August 24, 1912, 37 Stat. 417, 465), therefore the principles passed upon below are not necessarily decisive. But aside from the disregard of the admissions resulting from the pleadings which the suggestion involves and the entire absence of even an intimation that such a contention was raised in either of the courts below, we put the belated suggestion out of view, since as it is not disputed that the defendant clerk was under obligation to meet the expenses of his office from the fees and emoluments thereof and to pay over to the United States only the surplus resulting, we think the distinction assumed to arise from the proposition stated makes no difference in the application of the principles which the court below held to be conclusive and the soundness of which we are now therefore required to pass upon.

As we agree with the lower court that the two propositions decided by the trial court embraced the whole case, we are thus brought, first, to determine whether the fees and emoluments collected by the clerk and deposited by him in bank and upon which interest was allowed him were public moneys of the United States, thus entitling the United States to the interest as an increment of its ownership. That it was not is so completely foreclosed as to cause it to be only necessary to consider the previous ruling on the subject.

In *United States* v. *Mason*, 218 U. S. 517, the court was called upon to determine the validity of the action of a

circuit court of the United States in quashing three indictments against the clerk of a circuit court of the United States for the "embezzlement of certain moneys of the United States," which moneys were a portion of the surplus of fees and emoluments of his office over and above the compensation and allowances authorized by law to be retained by him. The indictments were based, and the sole reliance to sustain them and thus reverse the court below was rested, upon §§ 5490 and 5497, Revised Statutes, with the amendments made by the Act of February 3, 1879, c. 42, 20 Stat. 280, each of which sections exclusively dealt with embezzlement of "public moneys." Whether, therefore, the particular moneys which were there in question, being derived from fees and emoluments of the clerk, were public moneys required necessarily to be decided. Reviewing historically the legislation covering clerks of courts of the United States which had been previously recapitulated in *United States* v. *Hill*, 120 U. S. 169, it was pointed out, first, that originally clerks of courts were not salaried, but were remunerated by the right to collect and retain established fees and emoluments and that under such legislation the sums collected by the clerks were in no sense public moneys of the United States, but were moneys of the clerks held by them in their personal capacity in payment for their official services.

Coming to state the evolution in the situation by which in time it came to pass that a limit was placed on the amount of compensation which a clerk should annually receive and consequently making it his duty to account for his fees and emoluments and to turn over to the United States the surplus, if any, remaining after the payment of his compensation and the expenses of his office, the court observed (pp. 523–4):

"The plain object of this statute was to limit the amount which the clerk was to retain and to require an accounting, an audit of expenses, and a payment of the surplus. Other-

wise the established method of administering the office was not changed. The fees were to be recovered as theretofore; and to the extent of the amount of the fixed compensation of the clerk and the necessary expenses of his office, he was entitled to use and to pay as formerly. The statute suggests no other course. What, if anything, should be paid into the public treasury at the end of the half year, when he was to make his return, depended upon the amount of the fees, the amount of the expenses and the result of the audit. If his fixed compensation and his necessary expenses exhausted the fees there would be nothing to pay. The amount payable was to be determined when the return was made."

Testing the possible application of the statutes dealing with the embezzlement of public moneys to the rights and duties of a clerk to collect the fees and emoluments of his office and to make use of them as authorized by law, it was pointed out that such application could not be made because of the incompatibility between the powers and duties of the clerk, on the one hand, and the provisions of the statutes relied upon, on the other. This incongruity was aptly illustrated by the statement which follows dealing with the duties of the clerk and the impossibility of applying to them the prohibitions of one of the statutes in question (p. 525):

"They lay outside of the prohibition of § 16 against loaning, using, converting to his own use, depositing in banks, and exchanging for other funds, for it was upon these fees that the clerk depended for his livelihood and for the payment of the expenses of his office, subject only to the duty twice a year to make his accounting and to pay over the surplus if the fees exceeded the total amount allowed him."

Again marking the broad line which lay between public money and the clerk's fees and emoluments and his right to collect and disburse the same, the court declared (p. 529):

"There has thus been established a distinct system with

respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. This consideration, however, does not aid the prosecution, for they were attached to the office before the statute of 1841, when they belonged to the clerk without any duty on his part to account for any portion of them."

And once more emphasizing the distinction it was said (p. 531):

"The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount payable when the return is made the clerk is not trustee but debtor. Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent."

Indeed the decisive principles which were thus announced in the *Mason Case* were but a reiteration and application of the general doctrine on the subject annouced in *United States* v. *Hill*, 123 U. S. 681, where it was in express terms pointed out that "The clerk of a court of the United States collects his taxable 'compensation,' not as the revenue of the United States, but as fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law."

Conclusively disposing as these cases do of the contention of the Government as to public moneys of the United States, it leaves only for consideration the question of whether the interest on the sum of the fees and emoluments deposited by the clerk in bank was in and of itself an emolument for which he was liable to account. But that

question is virtually also foreclosed in view of what was held in the *Mason Case*, since the individual character of the bank deposit as there defined and the right to make it necessarily causes the increment of such deposit, that is, the interest, to partake of the character of the principal. And besides, aside from the ruling in the *Mason Case*, it had been previously held that a sum collected by a clerk for a service not pertaining to his office or provided for in the schedule of fees allowed him for official services was not a fee or emolument in the sense of the statute (*United States* v. *Hill*, 120 U. S. 169).

Although at the outset we eliminated from consideration liability for interest on money of litigants deposited with the clerk under the rules of court because not embraced in the claim of money or property of the United States upon which all the Government contentions here rest, in leaving the case we observe that the question of the liability of the clerk to pay interest to litigants on money deposited by them is in a large degree covered by the rules of court annexed to the plea, which permit in the cases specified an application of a litigant to the court to direct the allowance of such interest and to provide for its payment by the clerk when the request is granted.

In conclusion we direct attention, as was done in the *Mason Case* and as did the trial court in this case, to the incompatibility which would result, on the one hand, from enforcing an absolute obligation on the part of the clerk to account for all the fees and emoluments of the clerk's office whether collected or not as well as his duty to defray the expenses of his office out of such revenue, and the upholding, on the other hand, of the conflicting theory that the fees and emoluments were public moneys and the power of the clerk to deal with them accordingly limited.

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE dissent.